INDEX.

ABANDONMENT.

INDICTMENT IN STATUTORY LANGUAGE. When a statute defining an offense employs terms which have a fixed legal signification, an indictment following the language of the statute, without more, will be good.

This rule is applicable to an indictment against a father under section 34, page 497, Wag. Stat., for "abandonment" of his child. *The State v. Davis*, 467.

ABATEMENT.

PLEA IN. See Beattie v. Stocking, 196.

ABORTION.

AN indictment for procuring an abortion is bad if it does not aver that the abortion was not advised by a physician to be necessary to preserve the life of the woman. Wag. Stat., § 34, p. 450. *The State v. Meek*, 355.

ACCRETION.

THE doctrine of *Benson v. Morrow*, 61 Mo. 345, on this subject, reaffirmed. *Lamme v. Buse*, 463.

ACQUIESCENCE.

GUARANTY. Acts of acquiescence or ratification will not make one liable upon a written guaranty for things which do not come within the terms of the guaranty. *Shine's Administrator v. The Central Savings Bank*, 524.

AS VALIDATING DEFECTIVE EXECUTION OF CORPORATE POWERS. See Chouteau v. Allen, 290.

ACTION.

1. JOINT AND SEVERAL OBLIGATIONS: SEVERAL ACTIONS. The recovery of

a judgment on a note against one of the makers and the administrator of the individual estate of a deceased member of a firm which was joint maker with him, will not prevent recovery against the partnership estate of the firm in another action. Under sections 1, 2 and 4, Wag. Stat., p. 269, the obligation is joint and several; upon the death of one of the members of the firm the cause of action survives against the administrator of the partnership estate, and the holder of the note has the right to sue any other persons liable without losing his recourse against the estate. *Knox County Savings Bank v. Cottey*, 150.

2. EQUITY: PARTIES. Plaintiff borrowed of C upon his note and mortgage, $5,000, of which sum it was agreed that plaintiff should receive $2,500, and the other $2,500 should be held to pay off an existing mortgage upon plaintiff's land when it should become due. The money was, by agreement, placed with the defendant bank, by whom $2,500 was paid to plaintiff, and the remainder was placed to the credit of one M, who converted it to his own use. The $2,500 mortgage coming due, C, to protect himself, bought it in and held it as a charge against the plaintiff and his land, and to indemnify himself, obtained further security from M. In an action against the bank, plaintiff obtained judgment for the money placed to the credit of M, with interest; *Held*, that this was error, as plaintiff was in no event entitled to have this money; *Held, further*, that in order to a complete adjustment of all the equities, C and M should be made parties to the suit. *Judy v. Farmers & Traders Bank*, 407.

3. JUSTICE'S JURISDICTION: CIVIL ACTION TO RECOVER FINES. A statute which provides that in certain cases fines may be recovered by civil action to the use of the county before a justice of the peace, (Wag. Stat., § 29, p. 516,) does not authorize a proceeding before a justice of the peace founded on an affidavit charging, not a pecuniary liability, but a criminal offense, on which a warrant is issued, and the defendant is arrested and forcibly taken before the justice and fined. Such a proceeding is not a civil action. *The State v. Ford*, 469.

WHEN THERE MAY BE SEVERAL ACTIONS GROWING OUT OF SAME NUISANCE. See Van Hoozier v. Hannibal & St. Joseph Railroad Company, 145.

ADMINISTRATION.

1. WIDOW'S ALLOWANCE: RENUNCIATION OF WILL. When a widow is entitled under her husband's will to precisely the same amount of personal property that she would take under the administration law, (Wag. Stat., § 35, p. 88,) and she actually receives it, the fact that upon subsequently renouncing the provisions of the will, she does not surrender the property to the administrator, will not invalidate the renunciation. As soon as the renunciation is made, her right to the property becomes absolute under the law. *Register v. Hensley*, 189.

2. PROBATE JURISDICTION: VENDOR'S LIEN. A court of probate whose jurisdiction is limited to "suits and proceedings instituted against executors and administrators upon any demand against the estate" of any decedent, has no power to enforce a vendor's lien against land belonging to an estate of a decedent. The heirs are necessary parties to such a suit. *Ross v. Julian*, 209.

3. ——— : PROCEDURE WHERE DECEDENT LEAVES LAND NOT PAID FOR. When a decedent leaves land, the purchase money for which is unpaid, the probate court can deal with the land only in the manner provided by sections 2, 3 and 4, of article 3, of the administration law, (Wag. Stat., p. 94). It may allow the debt as a demand against the estate, to be paid in its order like other debts, but cannot declare it a lien, and order it first paid out of the proceeds of the land when sold. *Ib.*

4. ———: ———: SALE OF SUCH LANDS: WHAT TITLE PASSES: DISTRIBUTION OF PROCEEDS. When an administrator for the purpose of paying debts, sells land of his intestate, the purchase money of which is unpaid, the purchaser takes it subject to the vendor's claim for the purchase money. If the vendor is himself the purchaser, he stands in the same position as a stranger, and must pay the amount of his bid without deducting the amount of his claim. The proceeds of such a sale are to be distributed among the creditors in the order of priority of their demands. *Ib.*

5. ADMINISTRATOR'S SALE: RECORD EVIDENCE: PAROL EVIDENCE. A recital in an order of approval of an administrator's report of sale, showing that the sale was held on a day when the probate court was in session, may be contradicted by the production in evidence of another order showing that the court stood adjourned on the day of the sale.

Parol evidence will not be received to show that notwithstanding the order of adjournment, the court was in point of fact in session. (*Mobley v. Nave*, 67 Mo. 546.) *Ainge v. Corby*, 257.

6. ALLOWANCE OF JUDGMENT: LIMITATIONS. No judgment is too old to be allowed against the estate of a decedent until the time has elapsed since its rendition, which the law designates as the period when presumption of payment may be indulged. R. S. 1879, § 3251. *Ewing v. Taylor*, 394.

7. PRESENTATION OF DEMANDS: NOTICE. In presenting a judgment for allowance against the estate of a decedent, the same notice is required as in the presentation of other demands. *Ib.*

8. AN administrator has no power to transfer an account due the estate without an order of court authorizing the transfer. (*Stagg v. Linnenfelser*, 59 Mo. 336) *Weil v. Jones*, 560.

9. PARTY. A suit on the bond of an executor or administrator can only be maintained in the name of the State to the use of the party aggrieved; not in the name of the latter alone. *Woodworth v. Woodworth*, 601.

10. CONCLUSIVENESS OF FINAL SETTLEMENT. A final settlement of an administrator with the will annexed, has the force and effect of a judgment, and, until impeached and set aside in an appropriate proceeding, precludes any action upon the bond of the executor The only exception to the rule of the conclusiveness which attends a final settlement, is that laid down in section 6, page 118, Wag. Stat. *Ib.*

11. PROMISSORY NOTE; CONSIDERATION: ADMINISTRATION. A delinquent administrator gave his own note in settlement of a demand against the estate of his intestate, upon an understanding that a

suit then pending against him should be dismissed. The plaintiff afterwards refused to dismiss until the admini-trator should pay another demand which had been allowed against the estate. This was paid, and the suit was then dismissed. *Held*, that the exaction of this payment before carrying out the agreement to dismiss constituted no defense to an action on the note. *Smith v. Paris*, 615.

See Ford v. Hennessy, 580.

ADVERSE POSSESSION.

1. MISTAKEN POSSESSION, WHEN ADVERSE. Where the owner of a tract of land takes into his inclosure adjoining land which does not belong to him, the possession of the latter will be deemed adverse to the true owner if it is held under the belief that the land lies within the bounds of his own tract, and without any purpose of surrendering it to the true owner when the true line shall be ascertained. (Following *Walbrunn v. Ballen*, 68 Mo. 164.) *Cole v. Parker*, 372.

2. PUBLIC ROADS: TITLE BY USER. Ten years adverse occupancy and use of a road by the public, acquiesced in by the owner, will vest in the public an easement in the road and cause it to become a highway. *The State v. Wells*, 635.

AGISTMENT.

LIEN: ACTION UNDER THE STATUTE: TENDER. Tender of the full amount due for the keep of cattle extinguishes the lien given by the statute, (2 Wag. Stat., 906,) but does not take away the plaintiff's right to an ordinary money judgment for that amount without costs if he refuses the tender and sues to enforce a lien for a greater amount. *Berry v. Tilden*, 489.

AMENDMENT.

AMENDMENT OF PLEADINGS. Under the circumstances disclosed in the record, the trial court committed no error in refusing permission to the defendant to file an amended answer during the trial. *The Weed Sewing Machine Company v. Philbrick*, 646.

APPEAL.

1. AFFIDAVIT FOR APPEAL. Where the trial court allowed the appellant ten days time in which to file his bill of exceptions and affidavit for appeal, and the latter was not filed until after that time had elapsed, but there was nothing in the record to show that it was not filed during the same term; *Held*, that there was no ground for dismissing the appeal. *Pershing v. Canfield*, 140.

2. APPEAL FROM JUSTICE'S COURT: WAIVER OF NOTICE. In order to constitute a waiver of the notice required by law to be given when an appeal is taken from a judgment of a justice of the peace, a notice o take depositions served upon the appellant after the case is in the appellate court, should appear to have been given by the ap-

pellee or his attorney. If this does not appear, and the depositions taken in pursuance of the notice have not been filed in court, it will not operate a waiver. *Wolff v. The Danforth Artificial Light Company*, 182.

DEATH OF PARTY PENDING APPEAL. See Wilson v. Garaghty, 517.

ARBITRATION.

AWARD. Defendant's cattle were fed by plaintiffs, under an agreement that the fodder should be paid for at the end of the season at the customary price paid in the neighborhood, and defendant being unable to agree with plaintiffs what was the customary price, joined with them in submitting the question to arbitrators, who fixed the price. *Held*, that their determination was binding. *Davenport v. Fulkerson*, 417.

OBLIGATION TO ARBITRATE, NOT SPECIFICALLY ENFORCEABLE. See City of St. Louis v. St. Louis Gaslight Company, 69.

ASSAULT.

SUFFICIENCY OF INDICTMENT. An indictment which charges that the defendant did obstruct, resist and oppose an officer attempting to effect his arrest "by making an assault," and did then and there shoot at the officer with certain pistols loaded with gunpowder and leaden balls, is not bad because the assault is not charged to have been made with a deadly weapon. The other facts stated make it good under section 29, page 449, Wag. Stat., without any express charge of assault. (*State v. Phelan*, 65 Mo. 547.) *The State v. Estis*, 427.

ASSIGNMENT.

LIEN OF JUSTICE'S EXECUTION: SUBSEQUENT ASSIGNMENT FOR BENEFIT OF CREDITORS. The lien of an execution in the hands of a constable holds good against a subsequent assignment for the benefit of creditors under the general assignment law. *Frost v. Wilson*, 664.

ATTACHMENT.

PRACTICE IN ATTACHMENT: PLEA IN ABATEMENT. A defendant in attachment does not waive his right to plead in abatement by taking an order for "leave to plead on the third Monday of the present term, or answer the 22nd day of January, 1876." Such an order preserves to him the right to elect whether he will plead in abatement or answer to the merits. *Beattie v. Stocking*, 196.

EFFECT OF SUPERVENING BANKRUPTCY. See State *ex rel.* Peirce v. Merritt, 275.

See Wangler v. Franklin, 659.

ATTORNEY.

1. DEED, EXECUTED UNDER POWER OF ATTORNEY, WHEN BINDING ON PRINCIPAL. If from a deed which purports to be executed by an attorney in pursuance of a power, it appears that the principal, in consideration of money paid to him, makes the grants and covenants therein expressed, and that the signature and seal are his, and that the deed was executed by him, by his attorney in fact, no precise form or arrangement of words is essential to make it the deed of the principal. *McClure v. Herring*, 18.

DEED: POWER OF ATTORNEY: LANDS, SUFFICIENT DESIGNATION OF. A power of attorney authorizing the conveyance of lands, described them as all the lands of which the grantor was seized in Harrison county. *Held*, a sufficient description. No more specific description is required in a power of attorney than would be required in an absolute conveyance by the principal. *Ib.*

3. EMPLOYMENT OF SPECIAL ATTORNEY BY COUNTY COURT. Section 35, page 205, Wag. Stat., does not authorize a county court to employ a special attorney to attend to county business, when the ciruit attorney resides within the county. In such case section 25, page 204, makes it the duty of that officer to attend to the law business of the county. *Dixon v. Livingston County*, 239.

BAILMENT.

SEE PLEDGE.

BANKRUPTCY.

1. ATTACHMENT: INTERVENTION OF BANKRUPTCY PROCEEDINGS: JURISDICTION OF STATE COURT. After property of a debtor had been attached on the ground of fraudulent conveyance, proceedings in bankruptcy were instituted and pressed to an adjudication against the debtor, and the attached property was taken by the assignee out of the sheriff's hands. *Held*, that these facts did not oust the State court of its jurisdiction of an action on the attachment bond brought by the alleged fraudulent purchaser. *The State ex rel. Peirce v. Merritt*, 275.

2. ACTS OF ASSIGNEE AS AFFECTING CREDITORS. The fact that an assignee in bankruptcy has affirmed a sale of goods made by the bankrupt, cannot affect the rights of creditors who, before the institution of the bankruptcy proceedings, have attached the goods for fraud in the sale. *Ib.*

3. SALE OUT OF ORDINARY COURSE: EVIDENCE: FRAUD: BANKRUPT LAW, NOT ADMINISTERED BY STATE COURT. The fact that a sale is made by a debtor out of the ordinary course of business, while it is a circumstance tending to prove fraud, will not warrant an instruction to the jury that the sale is *prima facie* fraudulent. Under section 35 of the bankrupt act such an instruction would be proper in proceedings instituted under that act in the Federal court; but in a suit in the State court the matters in dispute are to be determined, not by the bankrupt act, but by the common law and the statutes of the State. *Ib.*

BILL OF EXCEPTIONS.

1. A BILL OF EXCEPTIONS will not be disregarded by this court on the ground that it was filed in vacation, unless the record shows that to be the fact. *Weil v. Jones*, 560.

2. JUDICIAL NOTICE. This court cannot consider a bill of exceptions filed after the lapse of the term at which the motion for new trial was disposed of, unless the record shows that the filing was with consent of the adverse party. To determine whether it was filed after the term, judicial notice may be taken of the times fixed by statute for holding court. *The State v. Broderick*, 622.

BILL OF EXCHANGE.

ERASURE OF RESTRICTIVE INDORSEMENT WITHOUT DRAWER'S KNOWLEDGE: PAROL EVIDENCE. A drew upon B a bill of exchange for the amount of a debt due him from B. The bill was made payable to the order of C, who indorsed it: "Pay to D or order for collection for account of C." B received the bill, erased the indorsement, and procured the discount of the bill at the plaintiff bank. A afterwards received from B the proceeds of the discount. The bill not being paid, the plaintiff sued A, alleging that in procuring the discount B was acting as the agent of A. *Held*, 1st, That this could not be shown by parol evidence; 2nd, That the restrictive indorsement by C destroyed the negotiability of the bill, and operated as a mere authority to D to receive the proceeds for the use of A; 3rd, That the erasure of the indorsement, without the assent of A, destroyed the validity of the bill as to A, and plaintiff was bound to know that such was the effect when he discounted it. *The Mechanics Bank v. The Valley Packing Company*, 643.

BOND.

1. INDEMNIFYING BOND TO SHERIFF: VALID THOUGH NOT IN STATUTORY FORM. A bond given to the sheriff by a plaintiff in execution conditioned to indemnify a claimant of property taken under the execution against damages by reason of the seizure, is a valid bond, though it lacks the condition for the indemnification of the sheriff called for by section 28, page 607, Wagner's Statutes; and the claimant may maintain an action on such bond. *Flint ex rel. Lumpkin v. Young*, 221.

2. PRINCIPAL AND SURETY. A bond running in the names of several persons, one as principal and the others as sureties, but subscribed only by the sureties, is not obligatory on them. *Bunn v. Jetmore*, 228.

3. WHEN NON-NEGOTIABLE. A bond which, by its terms, is payable at a time certain, but contains a clause reserving to the makers "the right to pay the same at any time to be named by them, by adding to the principal a sum equal to twenty per cent. thereof," is non-negotiable for uncertainty as to the time of payment. *Chouteau v. Allen*, 290.

4. ———. Bonds with past due coupons attached are to be treated as dishonored paper. *Ib.*

5. ILLEGAL CONTRACT. Bonds issued in payment for work done under an illegal contract are not tainted with the illegality. SHERWOOD, C. J., and NORTON, J., dissenting. *Ib.*

6. PLEDGE: ASSIGNMENT BY PLEDGEE. A pledgee can ordinarily convey no greater right to the pledged property than he himself possesses If it is non-negotiable paper, it will be subject to the same defenses in the hands of the assignee as in his own. *Ib.*

7. BOND SUBSTITUTED FOR LOST BOND: BURDEN OF PROOF IN ACTION ON. In an action on a bond given in lieu of a bond which has been lost, with the understanding that the obligor shall not be held liable on the substituted bond unless the original cannot be found, the plaintiff cannot recover without proving that the original has not been found. *The Weed Sewing Machine Company v. Philbrick*, 646.

PROPER PARTY TO ACTION ON, IN A CERTAIN CASE. See State *ex rel.* Peirce v. Merritt, 275.

BRIBERY.

OF RAILROAD DIRECTORS. See Chouteau v. Allen, 290.

BURDEN OF PROOF.

See Weed Sewing Machine Company v. Philbrick, 646.

CAIRO & FULTON RAILROAD LANDS.

See Chouteau v. Allen, 290.

CHANGE OF VENUE.

IN CRIMINAL CASES. An affidavit for a change of venue in a criminal case on the ground of prejudice of the inhabitants, made after the lapse of the first term after the indictment found, or if the defendant when indicted was not in custody, or on bail, made after the lapse of the first term after his arrest, must show that the facts on which the application is grounded first came to the knowledge of the defendant since the last preceding continuance An affidavit that the facts "have more fully come to the knowledge of the defendant since the last adjournment," is not sufficient. *The State v. Boone*, 649.

COMPROMISE.

OFFER TO COMPROMISE. An offer to compromise never estops the party making it from setting up any legal defense or asserting any right to which the offer relates. *Cook v. The Continental Insurance Company*, 610.

CONDITION.

CONDITIONAL SALE OF PERSONALTY A condition in a contract of sale of personal property that the title shall remain in the vendor until the purchase money is paid, is valid and will be enforced even against a *bona fide* purchaser, notwithstanding it is not acknowledged or proved and recorded as required of certain instruments by section 5, page 280, Wag. Stat. That section does not apply to such contracts. *Wangler v. Franklin*, 659.

CONDITION SUBSEQUENT. See Otis v. Koontz, 183.

CONSIDERATION.

OF CONTRACT. See City of St. Louis v. St. Louis Gaslight Company, 69.

CONSPIRACY.

1. GAMING ACT: "POKER:" NO JOINT LIABILITY OF PLAYERS FOR MONEY LOST. In the game of "poker" each party plays for himself. Therefore, under the gaming act, (Wag. Stat., § 1, 660,) if there be no conspiracy of two or more to cheat another player and no agreement to divide the winnings, a joint action cannot be maintained against them by the loser to recover the amount of his losses. The action lies only against the winner. *Laytham v. Agnew*, 48.

2. A CONSPIRACY CANNOT be established upon opinion; it is provable only by facts. *Ib.*

3. DECLARATIONS OF A CONSPIRATOR made after the object of the conspiracy has been accomplished, are not admissible against his co-conspirators. *Ib.*

CONSTITUTIONAL LAW.

1. LEGISLATIVE POWER OVER COUNTY REVENUES: CRIMINAL COSTS. The Legislature having the same control over the revenues of the counties as it has over those of the State, may require costs in criminal cases, which, at the time they accrued, were by law payable out of the State treasury, to be paid by the counties. Hence, the State has not, since the 1st day of November, 1879, been liable for the board of a prisoner in the county jail for a term prior to that date, the bill of which was not certified by the judge and prosecuting attorney until after that date, the revised statutes, which then took effect, having transferred that liability from the State to the several counties. § 5608. *The State ex rel. Brown v. Holladay*, 137.

2. POLICE POWER: DESTRUCTION OF GAMBLING DEVICES WITHOUT JUDICIAL CONDEMNATION. A statute which authorizes an officer of police, upon information or personal knowledge that there is any prohibited gaming table or other gaming device kept within his district, to cause the same to be seized and brought before him and publicly destroyed, and makes no provision for judicial condemnation, violates the constitutional prohibitions against unreasonable seizures and against the taking of property without due process of law, and is, therefore, void. *Lowry v. Rainwater*, 152.

3. BACK TAX ACT OF 1877, CONSTITUTIONAL. The act of 1877 to provide for the collection of delinquent taxes, imposes no new obligation, and so is not obnoxious to the constitutional prohibition against retrospective laws. Acts 1877, p. 384. *The State to the use of Rosenblatt v. Heman*, 441.

4. RAILROAD: CONSTITUTIONAL LAW. The double damage section of the railroad law does not conflict with the constitution of 1865. *Cummings v. The St. Louis, Iron Mountain & Southern Railway Company*, 570.

5. CONSTITUTIONAL LAW: AMENDMENT OF STATUTES. Section 34 of article 4 of the constitution of 1875, does not require that when some of the sections of an act are to be amended, the entire act shall be set forth in the amendatory act, but only that those sections as amended shall be set forth in full.

The act of April 17th, 1877, amending the statute of 1865, in relation to the concurrent jurisdiction of circuit courts and justices of the peace in misdemeanor cases, conforms to this requirement. (Acts 1877, p. 281.) *The State v. Chambers*, 625.

6. ———: SUBJECT OF ACT: TITLE OF ACT. The above act of 1877 is not obnoxious to section 28 of article 4 of the constitution. It contains but one subject, and that is clearly expressed in the title. *Ib.*

7. CITY RECORDER EX-OFFICIO JUSTICE OF THE PEACE: CONSTITUTIONAL LAW. A provision in a city charter that the city recorder shall be *ex-officio* a justice of the peace within the limits of the city, does not violate any constitutional prohibition. *Frost v. Wilson*, 664.

8. HANNIBAL CITY RECORDER: CONSTITUTIONAL LAW: TITLE OF ACT. The title "An act to consolidate into one the various acts in relation to the charter of the city of Hannibal," is sufficiently comprehensive to embrace a section creating the office of recorder and vesting the recorder with the powers of a justice of the peace within the limits of the city. Acts 1873, p. 249, § 20. *Ib.*

CONTRACT.

1. JOINT AND SEVERAL OBLIGATIONS: SEVERAL ACTIONS. The recovery of a judgment on a note against one of the makers and the administrator of the individual estate of a deceased member of a firm which was joint maker with him, will not prevent recovery against the partnership estate of the firm in another action. Under sections 1, 2 and 4, Wagner's Statutes, page 269, the obligation is joint and several; upon the death of one of the members of the firm the cause of action survives against the administrator of the partnership estate, and the holder of the note has the right to sue any other persons liable without losing his recourse against the estate. *Knox County Savings Bank v. Cottey*, 150.

2. WRITTEN INSTRUMENT: SIGNATURE WITHOUT CONSENT. As between original parties, if one has procured the signature of the other to a written instrument, whether by fraud or not, which does not contain the contract made by the parties, but a different one, he cannot be permitted to avail himself of the writing, but must stand by the real contract. *Wright v. McPike*, 175.

3. CONTRACT FOR MUTUAL SERVICES: MEASURE OF DAMAGES. A party to a contract for mutual services cannot recover on the contract both the value of his services and damages for failure of the other party to render the services stipulated to be rendered on his side. If he recovers the money value of his own services that is all he is entitled to. *Otis v. Koontz*, 183.

4. CONDITION SUBSEQUENT: RAILROAD RIGHT OF WAY: CITY ORDINANCE. A city ordinance granting to a railroad company a right of way over a street provided that the grant should become null and void if the company should ever remove its machine shops from the city. *Held*, that this was a condition subsequent, in which no one had any legal interest but the company and the city, and if the company violated the condition by removing the shops, this did not *ipso facto* terminate the right of way so as to entitle the owner of a lot abutting upon the street to maintain an action of damages against the railroad company as for an unlawful occupation of the street. *Knight v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 231.

5. RAILROAD CONSTRUCTION CONTRACT: BRIBERY OF DIRECTOR. A construction contract is not void under sections 58 and 59 of the railroad law, (R. S. 1855, p. 438,) because the contractor has an agreement with a director of the railroad company to divide the profits of the contract with him. SHERWOOD, C. J., and NORTON, J., dissenting. *Chouteau v. Allen*, 290.

6. BONDS: ILLEGAL CONTRACT. Bonds issued in payment for work done under an illegal contract are not tainted with the illegality. SHERWOOD, C. J., and NORTON, J., dissenting. *Ib.*

7. JOINT CONTRACT: PARTY TO SUIT: DISCHARGE OF OBLIGATION. One of two obligees in a joint contract cannot sue upon the contract alone. Payment in full by the obligor to one of the joint obligees discharges the obligation. *Henry v. Mount Pleasant Township of Bates County*, 500.

8. RAILROAD: CONTRACT TO CARRY BEYOND TERMINUS. A railroad company may be bound by contract, express or implied, but not otherwise, to transport persons or property beyond the line of its own road. *Grover & Baker Sewing Machine Company v. Missouri Pacific Railway Company*, 672.

9. ———: POWER OF FREIGHT AGENT TO CONTRACT. The general freight agent of a railroad company has power to bind the company by a contract for transportation to points beyond its own line; but a station agent has no such power, and such a contract entered into by him is void, unless the authority has been expressly conferred by the proper superior officer, or there have been previous dealings from which the authority may be reasonably inferred, or the company has held itself out as a common carrier to such points. *Ib.*

10. ASSUMPTION OF ANOTHER'S DEBT BY ACCEPTANCE OF DEED WITH RECITAL. If a purchaser of land accepts and holds under a conveyance which contains a clause reciting that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note may enforce by a personal action. (*Heim v. Vogel*, 69 MO. 529.) *Fitzgerald v. Barker*, 685.

CORPORATION.

1. THE DOUBLE LIABILITY of a stockholder created by the constitution of 1865, could not be enforced by the corporation. *Liberty Female College Association v. Watkins*, 13.

2. ST. LOUIS GASLIGHT COMPANY: CONTRACT NOT ULTRA VIRES. The charter of the St. Louis Gaslight Company, a company incorporated for the purpose of supplying the city of St. Louis and its inhabitants with gaslight, provided that if, after twenty years from the 1st day of January, 1840, the city should resolve to purchase the gas-works from the company, or if, at such time, the city should decline to purchase, but, at the end of twenty-five years from said 1st day of January, 1840, the board of aldermen should then resolve to purchase, the company should sell and convey to the city their gas-works; provided, however, that the city should notify the company of its intention to purchase at either of the times prescribed, at least six months previous to the expiration of said terms of twenty and twenty-five years, respectively; and provided, further, that a failure to notify as provided should be deemed a refusal on the part of the city to purchase the interests of the company. If the city should not resolve to purchase at either of the times prescribed, then the charter of the company should be in full force for an additional term of twenty-five years from and after the 1st day of January, 1865. The charter further provided, as follows: "The corporation of the city of St. Louis and the board of directors of the St. Louis Gaslight Company, may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon; and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public." In 1846 a contract was made between the city and the board of directors of the company, without the assent of the stockholders of the company, whereby the city relinquished the right to purchase the gas-works in 1860, and in lieu thereof obtained the right to purchase in 1870, or at the period of every five years thereafter, in the manner and upon giving the notice of intention to purchase provided in the charter. In 1869 the city resolved to purchase, and immediately gave the company notice as provided by the charter. In May, 1870, this suit was instituted by the city to enforce its right to purchase. The company denying the validity of the contract; *Held*, that the right conferred upon the city by the charter was simply a privilege of becoming the purchaser of the gas-works on the 1st day of January, 1860, or the 1st day of January, 1865, and the city was under no obligation to purchase at either of these times, but might exercise the privilege or not at its option; and the substitution of the right to purchase in 1870, or at the end of any five years thereafter, instead of 1860, was not *ultra vires*, but was authorized by the above quoted clause of the charter; *Held*, also, that the contract does not contravene the general rule that a board of directors of a corporation cannot sell out its business and property and thus defeat the object of its organization without the consent of the stockholders. The clause of the charter above quoted authorized the board to make any contract with the city which it might deem beneficial, and the result of this contract was absolutely to continue the business of the company at least five years; *Held*, also, that although the differing circumstances and conditions of the corporations in 1846 and 1860 might have been a reason why the city should not have relinquished in 1846 the right to purchase in 1860, it was a reason that addressed

itself to the propriety and expediency of making such relinquishment, but did not affect the power.

PER NAPTON and HENRY, JJ. The contract of 1846 was invalid so far as it affected the right of the city, under the company's charter, to purchase in 1860 or 1865; no board of aldermen, prior to the times at which initial steps towards the purchase could have been taken under the charter, could waive the right of the city to purchase at such times. *City of St. Louis v. St. Louis Gaslight Company*, 69.

3. CORPORATION CONTRACT: ESTOPPEL. In 1859 the city resolved to purchase the gas-works, and the company, on being notified of this action, refused to sell on the ground that under the contract of 1846 the city had no right to buy. Relying upon this assertion by the company of the validity of the contract of 1846, the city took no further steps in 1860 or 1865, but lost her right to purchase at both of said times in the belief that under the contract the validity of which the company had thus asserted, she would have the privilege of purchasing according to its terms on the 1st day of January, 1870, or at any period of five years thereafter; *Held*, that the company when sued in 1870, upon the contract of 1846, was estopped from asserting its invalidity. *Ib.*

4. EQUITY WILL NOT COMPEL SPECIFIC PERFORMANCE OF OBLIGATION TO ARBITRATE, WHETHER GROWING OUT OF CONTRACT OR STATUTE: MANDAMUS. By the charter of the company and the contract of 1846, it was provided that the price to be paid by the city for the gas-works should be fixed by arbitrators, to be chosen by the city and the company in equal numbers, with an umpire, if necessary, to be selected by the arbitrators. In 1869, the city, having adopted a resolution to purchase, appointed arbitrators, and duly notified the company, but the company refused to appoint. This suit being instituted by the city to compel the company to sell at a price to be fixed by commissioners appointed by the court; *Held*, that the action would not lie; that it was an equitable proceeding to enforce specific performance of the contract of 1846, and the rule is well established that equity will not enforce specific performance of a contract of sale when the price remains to be fixed by arbitrators to be appointed by the parties; and the reason of the rule applies with even more force where the obligation to sell is of statutory origin. *Held*, also, that upon a proper case made, the company could have been compelled, by mandamus, to make the appointment. *Ib.*

5. CORPORATION CONTRACT: CONSIDERATION: ULTRA VIRES. In 1873 a contract was entered into between the city, the St. Louis Gaslight Company and another gaslight company, by which it was agreed that the contract of 1846 should be canceled, and all suits pending between the parties should be dismissed, and all causes of action between them considered as settled. The contract further provided that the city should have two years time in which to pay an indebtedness then due from her to the St. Louis Gaslight Company. It also relinquished to the city the exclusive right of that company to make and vend gas in a certain district of the city, reserving, however, the right equally with other companies and individuals to carry on that business in said district. It also provided that said company should lay at least two and one-half miles of mains in each year, as the city might direct, without charge to the city, anything in the charter to the contrary notwithstanding. By the charter the company had the right to charge the city 8 per cent. on the cost

of pipe and laying the same, and the company was not bound to lay any pipe when the proceeds arising from the sale of gas would not be sufficient to defray the expense of furnishing the same. In pursuance of this contract the company dismissed certain suits it was then prosecuting against the city. *Held*, that the dismissal of these suits and the other concessions made by the company, constituted a consideration for the surrender, by the city, of its rights under the contract of 1846, and the agreement to dismiss the suits the city was then prosecuting, including the present, which, whether adequate in point of value or not, was sufficient in law. *Held*, also, that the city did not, by the above mentioned resolution to purchase, appointment of arbitrators and notices given to the company, acquire a right to be treated in equity as the owner of the gas-works; and hence the contract of 1873 could not be impeached as *ultra vires* the city, on the ground that a municipal corporation cannot sell or dispose of property acquired for a public or governmental purpose. *Held*, also, that the clause of the company's charter providing that the city and company "may make generally such contracts in relation to the business of the company as may be beneficial to them and the public," as it was sufficient to authorize the making of the contract of 1846, was also sufficient to authorize its cancellation. *Held*, also, that the contract of 1873 was not *ultra vires* the company, as an attempt on the part of the company to absolve itself from the performance of a corporate duty, viz: the furnishing of gas to a portion of the city and its inhabitants; for the company only relinquished the right to exclude competition in the business of making and vending gas within that district of the city, and while the right to make and vend gas was a right conferred upon the company for the benefit both of the company and the public, and not for the sole benefit of either, the right to exclude competition was solely for the benefit of the company, and, therefore, one which, with the consent of its stockholders, it might surrender. *Ib.*

6. BY-LAW RESTRICTING TRANSFER OF STOCK. A by-law of a bank declared: "No transfer of stock shall be allowed or valid, so long as the holder is *in arrears* to the bank or *in any form indebted* to it." The statute under which the bank was organized provided: "No shares shall be transferred until all previous calls thereon shall have been fully paid in." Wag. Stat., § 16, p. 292. Another statute declared that when any shares of stock in any bank shall be sold, the officer shall execute a bill of sale to the purchaser, and shall also leave with the cashier of the bank a copy of the execution and his return thereon, "and the purchaser shall thereupon be entitled to all dividends and stock and to the same privileges as a member of such corporation, as such debtor was entitled to." Ib., § 53, p. 611. *Held*, that the by-law, construed as it must be, so as not to conflict with the spirit of these statutes, could not be held to forbid a transfer of any stock on which all previous calls have been paid. The word "arrears" in the first clause refers to unpaid calls, and the phrase "in any form indebted" in the other clause refers to indebtedness outside of the stock subscription. The by-law, therefore, did not justify the bank in refusing assent to a transfer on the ground that only thirty per cent. of the stock had been paid in, when no more had been called for by the directors. *Kahn v. The Bank of St. Joseph*, 262.

7. DEFECTIVE EXECUTION OF CORPORATE POWERS VALIDATED BY ACQUIESCENCE. If the officers of a corporation in undertaking to

carry out a resolution of the board of directors requiring them to execute a conveyance of lands, convey a quantity in excess of that specified by the resolution, and there is no way of determining what lands are rightfully conveyed, and what wrongfully, the conveyance will, for this reason, be held fatally defective, but long acquiescence of the corporation, accompanied by acts of recognition on its part, will cure the defect. *Chouteau v. Allen*, 290.

8. NOTICE OF UNAUTHORIZED ACTS OF OFFICERS: EFFECT OF ACQUIESCENCE. Notice to the officers of a corporation of the unauthorized acts of their predecessors in office is notice to the corporation, and if no dissent is expressed, ratification will be presumed, and the acts will become binding upon the corporation and its stockholders. *Ib.*

9. PARTIES: CORPORATION: MORTGAGE. A stockholder of a defunct corporation has such an interest as entitles him to defend a suit brought to foreclose a mortgage alleged to have been executed by the corporation in its life-time. So has one who has acquired an independent title to part of the lands embraced in the mortgage. *Ib.*

10. PLEDGE: OF CORPORATE ASSETS BY DIRECTORS TO THEMSELVES. Any attempt by the directors of a corporation to make a pledge of the assets of the corporation in favor of themselves, will be scrutinized by a court of equity with the most rigorous and jealous observation. *Ib.*

11. CORPORATION: ESTOPPEL: PROMISSORY NOTE. The maker of a note payable to "the Missouri City Savings Bank," is estopped in an action on the note to deny that the bank is a corporation. *Stoutimore v. Clark*, 471.

See Emory v. Joice, 537.

See Dunn v. The St. Louis, Iron Mountain & Southern Railway Company, 663.

COSTS.

1. LEGISLATIVE POWER OVER COUNTY REVENUES: CRIMINAL COSTS. The Legislature having the same control over the revenues of the counties as it has over those of the State, may require costs in criminal cases, which, at the time they accrued, were by law payable out of the State treasury to be paid by the counties. Hence, the State has not, since the 1st day of November, 1879, been liable for the board of a prisoner in the county jail for a term prior to that date, the bill of which was not certified by the judge and prosecuting attorney until after that date, the revised statutes, which then took effect having transferred that liability from the State to the several counties. § 5608. *The State ex rel. Brown v. Holladay*, 137.

See Berry v. Tilden, 489.

COUNTY.

1. EMPLOYMENT OF SPECIAL ATTORNEY BY COUNTY COURT. Section 35,

page 205, Wag. Stat., does not authorize a county court to employ a special attorney to attend to county business, when the circuit attorney resides within the county. In such case section 25, page 204, makes it the duty of that officer to attend to the law business of the county. *Dixon v. Livingston County*, 239.

2. ———, NOT AUTHORIZED BY CHILLICOTHE & BRUNSWICK RAILROAD CHARTER. The power given to the county court of Livingston county by the charter of the Chillicothe & Brunswick Railroad Company to "take proper steps to protect the interests of the county," and to "appoint an agent to represent its interests," did not authorize that court to employ a special attorney for the purpose of prosecuting an action to protect the interests of the county as a stockholder in that company, while the circuit attorney of the circuit lived within the county. It was his duty to prosecute such action. *Ib.*

3. DISCONTINUANCE OF A ROAD BY COUNTY COURT. The county court can discontinue or vacate a public road only after a proper proceeding had in the manner pointed out by the statute. It cannot by its mere order or by instructions to the road overseer divest the rights of the public, whether they were acquired by dedication or by adverse possession. *The State v. Wells*, 635.

4. COUNTY TREASURER: UNAUTHORIZED PAYMENT OF WARRANTS. A county treasurer who pays a warrant when there is no money in the fund on which it is drawn, cannot recover the amount from the county, and it does not matter that the payment was made at the instance of the county court and upon their promise to make good the amount, nor that the warrant was received from the treasurer and canceled by the court. *Cook v. Putnam County*, 668.

COUNTY SCHOOL FUNDS. See Johnson County v. Gilkeson, 645.

POWER OF LEGISLATURE OVER COUNTY REVENUE. See State *ex rel.* Brown v. Holladay, 137.

COUNTY TREASURER.

See Cook v. Putnam County, 668.

COUNTY WARRANT.

See Cook v. Putnam County, 668.

COURT HOUSE.

See Napton v. Hurt, 497.

CRIMINAL LAW.

1. VARIANCE IN NAME: EVIDENCE: PRACTICE. Where the court which tried an indictment for assault, has expressly found a variance between the real name of the party assaulted and the name as given in the indictment, to be immaterial and not prejudicial to the

defendant, the Supreme Court will not set aside a judgment of conviction. Under the statute, (Wag. Stat., § 22, p. 1089,) the trial court is the judge of the materiality of the discrepancy. *The State v. Wammack*, 410.

2. ———: GRAND JURY: EVIDENCE. When such a discrepancy has been shown to exist, it is not admissible to show by the testimony of a member of the grand jury who was meant by that body. *Ib.*

3. INDICTMENT FOR MURDER: CONVICTION OF MANSLAUGHTER: ASSISTING SUICIDE. A prisoner indicted for murder is properly convicted of manslaughter in the first degree if the evidence shows that his offense consisted in assisting the deceased in committing suicide. R. S. 1879, § 1239. *The State v. Ludwig*, 412.

4. ASSISTING SUICIDE. Upon the trial of an indictment under the statute which declares every person "deliberately assisting" another in the commission of self murder, guilty of manslaughter in the first degree, it is no error to instruct that the defendant is guilty if he was "deliberately present, assisting" the deceased. *Ib.*

5. INDICTMENT IN STATUTORY LANGUAGE: ABANDONMENT. When a statute defining an offense employs terms which have a fixed legal signification, an indictment following the language of the statute, without more, will be good.

This rule is applicable to an indictment against a father under section, 34, page 497, Wag. Stat., for "abandonment" of his child. *The State v. Davis*, 467.

6. INTENTIONAL HOMICIDE. A homicide intentionally committed while resisting an assault by the person slain, cannot be manslaughter in the second degree. If an offense at all, it is murder in the second degree or manslaughter in the fourth degree. *The State v. Edwards*, 480.

7. SENTENCE UPON GENERAL VERDICT. A general verdict of guilty upon an indictment in several counts, all relating to the same transaction, but charging different degrees of the same offense, will sustain a sentence for the highest degree charged, especially in a case where all the evidence shows that the offense could only have been of that degree, and the instructions relate only to that degree. *The State v. Core*, 491.

8. HOMICIDE committed in the attempt to perpetrate robbery, arson, &c., is not necessarily murder. R. S. 1879, § 1232. *The State v. Earnest*, 520.

9. DYING DECLARATIONS. Statements of the victim of a homicide will be admissible as dying declarations, if, at the time they were made, he was conscious of impending death and had no hope of recovery. A hope subsequently entertained will not affect their admissibility. *The State v. Kilgore*, 546.

10. INSTRUCTIONS: IMPEACHING TESTIMONY: PRACTICE, CRIMINAL. The court is not bound, in a criminal case, to instruct the jury as to the proper effect of testimony offered to impeach defendant's witnesses, unless an instruction is asked by the defendant. (Distinguishing *State v. Branstetter*, 65 Mo. 149.) *Ib.*

11. ST. LOUIS VEHICLE LICENSE ORDINANCE: ENFORCEMENT OF, BY CRIMINAL PROSECUTION. The city of St. Louis has power, under its charter, to impose, and by criminal prosecution, enforce penalties for violation of an ordinance exacting a license from vehicles using the streets of the city. *The City of St. Louis v. Green*, 562.

12. INSTRUCTIONS: COUNTY AUDITOR, AGENT, SERVANT: EMBEZZLEMENT. Upon the trial of an indictment for embezzlement alleged to have been committed by the defendant in the capacity of servant and agent of the county, the proof showed that he held the position of county auditor, and that in addition to his salary as auditor he was allowed by the county court and drew a salary as custodian of the funds embezzled. The defense was that these funds came into his hands as auditor, and the court instructed the jury that if they so found they should acquit. The court further instructed the jury as follows: "If he received them (the funds embezzled) whilst he actually held the dual official relation to the county, of auditor and agent, or auditor and servant, and it was his duty to receive them, not as auditor, but as agent or servant, it is immaterial whether he received them as auditor or agent, or as auditor or servant, for the law will not in such case heed such a distinction." *Held*, that taking the instructions together, the latter instruction could not be understood as submitting to the jury the question whether it was the duty of the defendant to receive the money as auditor, or as agent or servant. *The State v. Heath*, 565.

13. PUBLIC ROAD: OBSTRUCTION: SCIENTER. It is no defense to a prosecution for obstructing a public highway, that the defendant did not know that the highway was legally established. *The State v. Wells*, 635.

RECOGNIZANCE. See The State v. Horn, 466.

DAMAGES.

1. MEASURE OF DAMAGES ON A CONTRACT FOR MUTUAL SERVICES. A party to a contract for mutual services cannot recover on the contract both the value of his services and damages for failure of the other party to render the services stipulated to be rendered on his side. If he recovers the money value of his own services that is all he is entitled to. *Otis v. Koontz*, 183.

2. COLLECTION AND DISCHARGE OF WATER UPON NEIGHBORING LANDS. A land owner has no right to concentrate into one stream the water coming upon his own land and discharge it upon his neighbor's. Even if it would naturally flow in that direction, the concentration would necessarily increase the injury, and for this an action would lie. *McCormick v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 359.

3. REPLEVIN: JUDGMENT IN: DAMAGES. If the evidence in an action of replevin does not show that the plaintiff sustained damage by reason of the detention of the property, a judgment in his favor should be for possession alone, and not for possession and damages. *Wangler v. Franklin*, 659.

DEED.

1. DEED, EXECUTED UNDER POWER OF ATTORNEY, WHEN BINDING ON PRINCIPAL. If from a deed which purports to be executed by an attorney in pursuance of a power, it appears that the principal, in consideration of money paid to him, makes the grants and covenants therein expressed, and that the signature and seal are his, and that the deed was executed by him, by his attorney in fact, no precise form or arrangement of words is essential to make it the deed of the principal.

CASE ADJUDGED. A deed was drawn thus: "I, H, for myself, and as attorney for T and T, by their letters of attorney under their hands and seals, in consideration of $—, to us paid by L, do sell and convey to L * * And we, the said T and T, do covenant with said L * * In witness whereof I, H, in my own right, have hereunto set my hand and seal, and, as attorney for said T and T, have hereunto set their hands and seals." To said deed were subscribed the names of H and of T and T by H, their attorney in fact, with seals severally affixed to all the names. *Held*, that such deed was sufficient in form as the deed of T and T. *McClure v. Herring*, 18.

2. POWER OF ATTORNEY: LANDS, SUFFICIENT DESIGNATION OF. A power of attorney authorizing the conveyance of lands, described them as all the lands of which the grantor was seized in Harrison county. *Held*, a sufficient description. No more specific description is required in a power of attorney than would be required in an absolute conveyance by the principal. *Ib.*

2. QUIT-CLAIM DEED: AFTER-ACQUIRED TITLE: PRESUMPTIONS. A quit-claim deed will not convey an after-acquired title; and the subsequent deed will not furnish a reasonable presumption that, prior thereto an equitable inchoate right existed, which passed by the deed of quit-claim, when such presumption would be in direct contradiction to the facts proven on the trial. *Kimmel v. Benna*, 52.

4. ACKNOWLEDGMENT OF PARTNERSHIP INSTRUMENT. A certificate of acknowledgment of an instrument executed in the name of a firm, should show by which member of the firm the signature was made and acknowledged. If the signing and acknowledgment purport to have been done by the firm and in the firm name, the instrument will not be entitled to record. *Sloan v. The Owens, Lane & Dyer Machine Company*, 206.

5. CORPORATION DEED. A deed running in the name of the C. & F. R. R. Co., (a corporation) as grantor and signed "M. Brayman, president C. & F. R. R. Co.; G. R. Teasdale, secretary C. & F. R. R. Co.," is the deed of the corporation. *Chouteau v. Allen*, 290.

6. A CERTIFICATE OF ACKNOWLEDGMENT may be good without using the word "acknowledge." Words of equivalent import will be sufficient. *Ib.*

7. DEFECTIVE CONVEYANCE OF EQUITABLE INTEREST: EXECUTION. A conveyance by the owner of an equitable interest in land of his title, though defective for want of a sufficient description of the property, is not a nullity, but will pass the grantor's interest; and

a sale under an execution issued upon a judgment, subsequently obtained against him, will be of no effect. *Atkison v. Dixon*, 381.

8. MARRIED WOMAN'S DEED: IMPEACHMENT OF CERTIFICATE OF ACKNOWLEDGMENT. A certificate of acknowledgment of a married woman's deed made by a proper officer and in substantial compliance with law, is *prima facie* evidence of the acknowledgment; but it may be impeached, and for this purpose it is not necessary to show fraud or imposition practiced on the grantor. It will be sufficient to show that she was not examined separate and apart from her husband, or that she was not made acquainted with the contents of the instrument by the officer making the certificate. *Steffen v. Bauer*, 399.

9. A deed which is signed by both husband and wife, but in which the husband alone is named as grantor, conveys only his interest in the land. *McFadden v. Rogers*, 421.

10. REFORMATION OF DEED: GRANTOR'S RIGHT TO PAYMENT OF PURCHASE MONEY. A grantor cannot be compelled to correct errors in his deed, so long as the grantee is in default in the payment of the purchase money; and this rule extends to one claiming under the grantee, unless circumstances exist which estop the original grantor from asserting his right to insist on payment. *Ib.*

1. ASSUMPTION OF ANOTHER'S DEBT BY ACCEPTANCE OF DEED WITH RECITAL. If a purchaser of land accepts and holds under a conveyance which contains a clause reciting that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note may enforce by a personal action. (*Heim v. Vogel*, 69 Mo. 529.) *Fitzgerald v. Barker*, 685.

CONSTRUCTION OF. See Donnan v. The Intelligencer Printing & Publishing Company, 168

DEEDS OF TRUST AND MORTGAGES.

1. DEEDS, CONSTRUCTION OF: GRANTING CLAUSE PREVAILS. If there is a conflict between the granting clause and other parts of a deed, the latter must give way. Thus, where in a deed of trust the granting clause described the subject matter of the conveyance as an undivided two-thirds interest, and a subsequent clause empowered the trustee, upon condition broken, to sell the whole of the property; *Held*, that the trustee could only make title to an undivided two-thirds interest. *Donnan v. The Intelligencer Printing & Publishing Company*, 168.

2. ESTOPPEL: DEED OF TRUST. In a suit to foreclose a deed of trust given to secure two notes, one of the defendants by separate answer asserted absolute title in his co-defendant. He had already sold the property to his co-defendant with warranty of title. A foreclosure having been ordered; *Held*, that these facts estopped him to claim the benefit of the foreclosure as owner of one of the two notes. *Ib.*

3. PARTIES: CORPORATION: MORTGAGE. A stockholder of a defunct corporation has such an interest as entitles him to defend a suit

brought to foreclose a mortgage alleged to have been executed by the corporation in its life-time. So has one who has acquired an independent title to part of the lands embraced in the mortgage. *Chouteau v. Allen*, 290.

4. FORECLOSURE OF MORTGAGE: PRACTICE AND PLEADINGS. If a party to a foreclosure proceeding in his pleadings claims the ownership of bonds secured by the mortgage, it is error to enter up a decree in his favor as pledgee. *Ib.*

5. FORECLOSURE OF MORTGAGE: JURISDICTION. Since the circuit court has general jurisdiction over the foreclosure of mortgages, objection to the jurisdiction, based upon the fact that the mortgaged premises are not situate in the county where the suit is brought, must be taken by a proper plea, and will be waived by pleading to the merits. *Ib.*

6. PLACE OF SALE: REMOVAL OF COURT HOUSE. After the execution of a deed of trust, by the terms of which the trustee was authorized to sell at the court house in the City of Kansas, the court house was, by law, removed to and established at a different place in the same city. *Held*, that the trustee must sell at the new place and not at the old. *Napton v. Hart*, 497.

7. ASSUMPTION OF ANOTHER'S DEBT BY ACCEPTANCE OF DEED WITH RECITAL. If a purchaser of land accepts and holds under a conveyance which contains a clause reciting that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note may enforce by a personal action. (*Heim v. Vogel*, 69 Mo. 529.) *Fitzgerald v. Barker*, 685.

DEPOSITION.

EFFECT OF TAKING, AS WAIVER OF NOTICE OF APPEAL. See Wolff v. The Danforth Artificia. Light Company, 182,

DOWER.

1. NO DOWER IN LAND FRAUDULENTLY CONVEYED BY HUSBAND BEFORE MARRIAGE. A wife is not entitled to dower out of lands of her husband which, before her marriage, have been fraudulently conveyed to another, though the conveyance is subsequently set aside at the instance of creditors. *Gross v. Lange*, 45.

2. CASE IN JUDGMENT. Certain lands of J were sold under execution against him and conveyed by the sheriff to C, J furnishing the purchase money. Plaintiff subsequently married J, when a conveyance was made of part of the lands in trust for her and the rest to the children of the marriage. The creditors of J afterwards instituted proceedings which resulted in the sheriff's deed and the trust deed being set aside as in fraud of their rights, and the lands being sold to satisfy their claims. On these facts, *Held*, that J's widow was not entitled to dower in the lands. *Ib.*

3. HOMESTEAD: EFFECT OF CHANGE OF STATUTE: WIDOW'S RENUNCIA-

TION OF HUSBAND'S WILL. The widow's right of homestead in her husband's lands becomes fixed upon his death, and is not affected by a subsequent change in the statute, occurring before she applies to have the homestead set apart. Nor does it matter that he left a will, by the terms of which, she took a different estate in the lands from what she would be entitled to under the homestead act, and she made no renunciation of its provisions until after the change in the statute, provided she did make a renunciation within twelve months after his death, as allowed by section 16 of the dower act, Wag. Stat., p. 541. *Register v. Hensley*, 189.

EJECTMENT.

1. JUDGMENT IN: ESTOPPEL. A judgment in ejectment is no bar to a second action between the same parties for the same property, whether the titles and defenses in both actions be the same or not. *Kimmel v. Benna*, 52.

2. EJECTMENT FOR WIFE'S LAND: HUSBAND ONLY PROPER PARTY DEFENDANT, WHEN. The wife is not a proper party defendant to an action of ejectment for land claimed by her under a deed which vests the title in her, but confers no separate estate; nor can she make herself such by claiming a separate estate in her answer. The husband's marital interest gives him the right to the possession, and he alone should be sued. *Wilson v. Garaghty*, 517.

2. ———: DEATH OF HUSBAND; WIFE'S SUBSEQUENT POSSESSION: APPEAL. Where judgment in ejectment goes against husband and wife jointly for land in which the husband has a marital interest as against her, and pending an appeal the husband dies, the suit abates as to him. After his death the possession becomes hers, but this will not support the pending judgment against her or authorize the rendition of a new one. *Ib.*

EVIDENCE IN. See Ainge v. Corby, 257.

EMBEZZLEMENT.

LARCENY: EMBEZZLEMENT. Section 15, page 514, Wag. Stat., expressly authorizes a person indicted for larceny to be convicted of embezzlement. This statute was overlooked in *State v. Stone*, 68 Mo. 101, which case is, for that reason, overruled. *The State v. Broderick*, 622.

See The State v. Heath, 565.

EMINENT DOMAIN.

1. RAILROAD: DAMAGES: BENEFITS. In estimating the damages growing out of the condemnation of a right of way for a railroad, the jury should consider the quantity and value of the land taken, and the damage to the tract of which it forms part by reason of the road running through it, and from the sum of these should deduct the benefits, if any, peculiar to that tract, arising from the running of the road through it; and by peculiar benefits is meant such benefits derived from the location of the road as are not com-

mon to it and the other land in the same neighborhood. *The Wyandotte, Kansas City & Northwestern Railway Company v. Waldo*, 629.

2. RAILROAD: DAMAGES TO ENTIRE TRACT. Where a tract of land consists of several parcels all connected and constituting one body, the jury, in estimating the damages sustained by the owner by reason of the condemnation of a right of way for a railroad across the tract, should consider the injury to the whole and not simply the injury to the parcels touched by the road. *Ib.*

EQUITY.

1. PURCHASE WITH KNOWLEDGE OF FORMER SALE. A purchaser of school land who pays the purchase money but fails to get a patent from the county, will be entitled to the benefit of one issued to a person who buys at a subsequent sale of the same land with knowledge of the former sale. Equity will decree the title divested out of the patentee and vested in the first purchaser. *Barksdale v. Brooks*, 197.

2. PLEDGE OF CORPORATE ASSETS BY DIRECTORS TO THEMSELVES. Any attempt by the directors of a corporation to make a pledge of the assets of the corporation in favor of themselves, will be scrutinized by a court of equity with the most rigorous and jealous observation. *Chouteau v. Allen*, 290.

3. DEFECTIVE CONVEYANCE OF EQUITABLE INTEREST: EXECUTION. A conveyance by the owner of an equitable interest in land of his title, though defective for want of a sufficient description of the property, is not a nullity, but will pass the grantor's interest; and a sale under an execution issued upon a judgment, subsequently obtained against him, will be of no effect. *Atkison v. Dixon*, 381.

4. REFORMATION OF DEED: GRANTOR'S RIGHT TO PAYMENT OF PURCHASE MONEY. A grantor cannot be compelled to correct errors in his deed, so long as the grantee is in default in the payment of the purchase money; and this rule extends to one claiming under the grantee, unless circumstances exist which estop the original grantor from asserting his right to insist on payment. *McFadden v. Rogers*, 421.

5. ACTION TO ENFORCE AGREEMENT TO PERMIT REDEMPTION. In order to maintain such an action, the plaintiff must prove very clearly and satisfactorily; 1st, That such agreement was actually made before the sale; 2nd. That through the contrivance or with the consent of the defendant, it deterred others from bidding at the sale; 3rd, As explanatory of the foregoing, the actual market value of the property at the date of the sale. A great disparity between such value and the price paid has a very material bearing with a court of equity in reaching a conclusion where evidence on the main points is inconclusive; 4th, The date of the offer to redeem, which should be within a reasonable time, if none is limited by the agreement. *Gillespie v. Stone*, 505.

6. GIFT BY ONE IN EXTREMIS TO ATTENDING PRIEST: PRIEST'S DUTY TO FAMILY OF DONOR. One F, a few days before his death, made a gift of all his money and executed a will devising all his other property to one H, a Roman Catholic priest, who had for six years been his pastor and father confessor, and had attended him constantly in

that capacity during an illness of a year's duration which preceded his death. No relative of F was with him during all this time, and he had no advice from any source except such as H gave. F lived as a single man and sometimes, though not always, represented himself to be such, but H had heard a rumor that he had a wife in Ireland. He, however, made no inquiry to ascertain the fact, and never suggested to F that he ought to provide for her. H gave the money to the archbishop of the church, who gave it to a convent. In an action by the widow and child of F against H, the archbishop and the convent, to set aside the gift and recover the money; *Held*, that it was the duty of H, before accepting the gift, to have ascertained the fact as to F's reported marriage and satisfied himself either that F had no family or that he was determined to disregard his family ties and obligations, and as H had not done this, the gift could not stand. The fact that he had no selfish motive and received no personal benefit from the transaction did not relieve him of this duty. *Ford v. Hennessy*, 580.

7. UNDUE INFLUENCE: SUIT TO SET ASIDE GIFT: PARTIES PLAINTIFF: ADMINISTRATION. The heirs, and not the administrator, are the proper parties to a suit to set aside a gift made by the deceased while *in extremis* as having been obtained of him by undue influence. *Ib.*

8. UNDUE INFLUENCE: SUIT TO SET ASIDE GIFT: PARTIES DEFENDANT. One who without consideration receives the benefit of a gift obtained by another through undue influence, is liable to an action for restitution; but not one whose only connection with the transaction is that he received the property and delivered it to the ultimate beneficiary. *Ib.*

9. RES ADJUDICATA. A judgment against an executor in a suit wherein he sought to recover of one who, as legatee, was entitled to all the property of the decedent, certain money which he had obtained from the decedent by gift before his death, is no bar to an action by the heirs to set aside the gift as having been procured by undue influence. The questions involved are not the same. *Ib.*

ENFORCEMENT OF AGREEMENT FOR A LIEN. See Pearl v. Hervey, 160.

JURY TRIAL IN EQUITY CASES. See Hess v. Miles, 203.

SET-OFF IN EQUITY. See Fulkerson v. Davenport, 541.

See Judy v. Farmers & Traders Bank, 407.

See Whetstone v. Shaw, 575.

ESTOPPEL.

1. VENDOR AND VENDEE: ACTION FOR PURCHASE MONEY: FAILURE OF TITLE: SURRENDER OF POSSESSION: ESTOPPEL. A vendee of land holding under a contract by the terms of which he is entitled to a warranty deed upon payment of the purchase money, and which recites delivery of possession by the vendor to the vendee, cannot, without surrendering possession, defeat the recovery of the purchase money by showing that the vendor had no title; nor will he be permitted to show that when he made the contract with the

plaintiff he was already in possession by virtue of a purchase from the true owner. The recital in his contract estops him. *Pershing v. Canfield*, 140.

2. DEED OF TRUST. In a suit to foreclose a deed of trust given to secure two notes, one of the defendants by separate answer asserted absolute title in his co-defendant. He had already sold the property to his co-defendant with warranty of title. A foreclosure having been ordered; *Held*, that these facts estopped him to claim the benefit of the foreclosure as owner of one of the two notes. *Donnan v. The Intelligencer Printing and Publishing Company*, 168.

3. NO ESTOPPEL. Where a creditor, at the time of accepting a note from his debtor denies the truth of a recital contained in it, and this is known both to the debtor and to a surety on the note, neither will be allowed, in an action on the note, to invoke the recital by way of estoppel. *Wright v. McPike*, 175.

4. A promise by a mortgagee made to a purchaser from the mortgageor to release his mortgage, with leave to the purchaser to make improvements, on the faith of which improvements have been made, do not operate an estoppel against the mortgagee, so as to prevent him from asserting a title derived through another and different mortgage. *Barrett v. Johannes*, 439.

5. CORPORATION: ESTOPPEL: PROMISSORY NOTE. The maker of a note payable to "the Missouri City Savings Bank," is estopped in an action on the note to deny that the bank is a corporation. *Stoutimore v. Clark*, 471.

6. RES ADJUDICATA. A judgment against an executor in a suit wherein he sought to recover of one who, as legatee, was entitled to all the property of the decedent, certain money which he had obtained from the decedent by gift before his death, is no bar to an action by the heirs to set aside the gift as having been procured by undue influence. The questions involved are not the same. *Ford v. Hennessy*, 580.

7. OFFER TO COMPROMISE. An offer to compromise never estops the party making it from setting up any legal defense, or asserting any right to which the offer relates. *Cook v. The Continental Insurance Company*, 610.

8. REPLEVIN: ATTACHMENT: INTERPLEA: ESTOPPEL. One claiming title to personal property which had been taken in attachment as the property of another, obtained leave of court to interplead in the attachment proceedings. He failed, however, to file an interplea, and judgment went in favor of the plaintiff in the attachment. In replevin against the sheriff to recover the property; *Held*, that these facts did not preclude the plaintiff's recovery. *Wangler v. Franklin*, 659.

OF FORMER JUDGMENT. See Kimmel v. Benna, 52.

BY ACTS *in pais*. See City of St. Louis v. St. Louis Gaslight Co., 69.

See McFadden v. Rogers, 421.

EVIDENCE.

1. A CONSPIRACY CANNOT be established upon opinion; it is provable only by facts. *Laytham v. Agnew*, 48.

2. DECLARATIONS OF A CONSPIRATOR made after the object of the conspiracy has been accomplished, are not admissible against his co-conspirators. *Ib.*

3. PROMISSORY NOTE: WAIVER OF NOTICE of dishonor of a promissory note cannot be shown by parol evidence. *Beeler v. Frost*, 185.

4. ADMINISTRATOR'S SALE: RECORD EVIDENCE: PAROL EVIDENCE. A recital in an order of approval of an administrator's report of sale, showing that the sale was held on a day when the probate court was in session, may be contradicted by the production in evidence of another order showing that the court stood adjourned on the day of the sale.

Parol evidence will not be received to show that notwithstanding the order of adjournment, the court was in point of fact in session. (*Mobley v. Nave*, 67 Mo. 546.) *Ainge v. Corby*, 257.

5. EVIDENCE IN EJECTMENT. To a petition in ejectment the defendant answered that he had purchased the land at a sale by one C. as administrator of J. F., and paid the purchase money in full; that C. had paid it over to C. F. as heir and creditor of J. F.; that defendant had gone into possession, and with the knowledge and acquiescence of C. F. had made valuable and lasting improvements. Plaintiffs claimed under C. F. At the trial plaintiffs read in evidence the final settlement of C. as administrator of the partnership estate of J. F. & Co., showing a balance against C. *Held*, that the evidence was irrelevant and tended to confuse the jury; and for the error in admitting it the judgment in favor of the plaintiff was reversed. *Ib.*

6. EVIDENCE OF CONTENTS OF MISSING PAPER. The custodian of a missing paper testified that he had made thorough search of his office wherever it would be likely to be, but had failed to find it. He, however, admitted that it might possibly be in the office, but said that if so it must be in some other file-box or pigeon hole; *Held*, that this disclosed a diligent search and an honest effort to find the paper, and was sufficient to authorize the admission of secondary evidence of its contents. *Studebaker Manufacturing Company v. Dickson*, 272.

7. A judgment will not be reversed for error of the trial court in excluding evidence when the jury has found the fact which the evidence tended to prove. *The State v. Ludwig*, 412.

8. On the trial of an indictment for resisting arrest under legal process, evidence to show that threats of personal violence had been made against the prisoner, (but not by the officer who made the arrest,) is inadmissible. *The State v. Estis*, 427.

9. EVIDENCE OF COLLATERAL FACTS: CRIMINAL LAW: ALIBI. Evidence may be given as to collateral facts if they are so connected with the main fact as to be material in the inquiry as to such main fact, or if they become material by being so connected with the main fact by the testimony in the case.

So, where the defense to a criminal action was an *alibi*, and the State, to overthrow the defense offered evidence that the prisoner, in company with another person, at a particular time, was at a particular place, evidence *was held* admissible, in rebuttal, to show that the person named, at the time named, was at a different and distant place. *The State v. Earnest*, 520.

10. PAROL EVIDENCE: RECORD ENTRY. Parol evidence is admissible to explain whether an ambiguous marginal entry upon the record of a judgment is an assignment or a satisfaction. *Emory v. Joice*, 537.

11. DYING DECLARATIONS. Statements of the victim of a homicide will be admissible as dying declarations, if, at the time they were made, he was conscious of impending death and had no hope of recovery. A hope subsequently entertained will not affect their admissibility. *The State v. Kilgore*, 546.

12. GOOD CHARACTER. If all the evidence in the case, including defendant's evidence of good character, shows him to be guilty, his character cannot justify, excuse, palliate or mitigate the offense. *Ib.*

13. MURDER: EVIDENCE OF IDENTITY. If the evidence given upon a trial for murder shows that the person killed bore the same name as that alleged in the indictment as the name of the victim, no other proof of identity need be given. *Ib.*

14. MURDER. Statements of the deceased are not binding upon the State in a trial for murder as admissions of a party to the record, and if not receivable on the footing of dying declarations or as part of the *res gestae*, must be excluded. *The State v. Curtis*, 594.

15. STATEMENT OF DEFENDANT IN A MURDER CASE. Where a statement made by the defendant in relation to a homicide charged against him is offered in evidence by the State, the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the State is entitled to the benefit of anything he said against himself. The latter the law presumes to be true; the former the jury are not bound to believe because said in a conversation proved by the State; they may believe or disbelieve it as it is shown to be true or false by all the evidence in the case. *Ib.*

16. NON-SUIT. The court should not take the case from the jury if there is any evidence, however slight, tending to sustain the allegations of the petition. *Kelly v. The Hannibal & St. Joseph Railroad Company*, 604.

17. DECEASED WITNESS; EVIDENCE is admissible to show what testimony was given on a former trial by a witness since deceased, provided the adverse party had an opportunity to cross-examine him. *Breeden's Administrator v. Feurt*, 622.

18. JUSTICE'S DOCKET. The identity of the docket and official papers of a justice of the peace may be established by the testimony of any competent witness. It is not necessary to call the justice. *The State v. Chambers*, 625.

19. JUSTICE'S DOCKET ENTRIES. The statute authorizing a certified transcript of justices' judgments to be received in evidence does not pro-

vide the only method of proving such judgments. The original entry on the justice's docket may be used. *Ib.*

20. BOND SUBSTITUTED FOR LOST BOND: BURDEN OF PROOF IN ACTION ON. In an action on a bond given in lieu of a bond which has been lost, with the understanding that the obligor shall not be held liable on the substituted bond unless the original cannot be found, the plaintiff cannot recover without proving that the original has not been found. *The Weed Sewing Machine Company v. Philbrick*, 646.

21. POSSESSION AS EVIDENCE OF OWNERSHIP: LARCENY: INSTRUCTION. Possession of personal property is presumptive evidence of ownership. If, therefore, one finds a mule in the possession of another, who claims ownership, and in good faith he buys the mule, he cannot be convicted of larceny, though the mule was stolen and the person from whom he bought was a stranger to him.

The judgment in this case was reversed for failure of the trial court to instruct the jury to this effect, though an instruction was given that they were not to convict unless they believed beyond a reasonable doubt that defendant did steal the mule, and unless the evidence excluded every other hypothesis than guilt. *The State v. Boone*, 649.

22. PROMISSORY NOTE: INDORSER. Where it was part of the defense of an indorser of a note, that he was induced to make the indorsement by plaintiff's promise to deliver certain securities for his indemnification, his testimony that he had never before indorsed the paper of the maker, and would not then have done so unless he had felt amply secured by the collaterals, was held to be competent as tending to prove the defense. *Sheedy v. Streeter*, 679.

OF CONSPIRACY. See Laytham v. Agnew, 48.

OF APPROVAL OF CITY ORDINANCE. See Knight v. The Kansas City, St. Joseph & Council Bluffs Railroad Company, 231.

OF NEGLIGENCE, AS SHOWN BY ESCAPE OF SPARKS FROM A LOCOMOTIVE. Kenney v. Hannibal & St. Joseph Railroad Company, 243, 252.

OF FRAUD. See State *ex rel.* Peirce v. Merritt, 275.

IN CASE OF VARIANCE IN INDICTMENT. See State v. Wammack, 410.

PAROL EVIDENCE. See Mechanics Bank v. Valley Packing Company, 643.

EXECUTION.

1. EXECUTION SALE: DEATH OF SHERIFF BEFORE EXECUTING A DEED: APPOINTMENT OF SUBSTITUTE. Under section 62 of the chapter on executions, which provides that on the death or removal of a sheriff after he has made a sale and before he has executed a conveyance, the court may appoint the sheriff then in office to execute and acknowledge a deed to the purchaser, the latter has only the same powers as the officer who made the sale would have had, if his death or removal had not intervened. *In re Guenzler*, 39.

2. ———: IN CASE OF CONVEYANCE BY PURCHASER BEFORE EXECUTION OF DEED. The court will not in a proceeding under this statute

compel a sheriff to execute a deed to the grantees of a purchaser who has died. But it may in such case permit the sheriff to execute the deed to his legal representatives without naming them. *Ib.*

3. INDEMNIFYING BOND TO SHERIFF; VALID THOUGH NOT IN STATUTORY FORM. A bond given to the sheriff by a plaintiff in execution conditioned to indemnify a claimant of property taken under the execution against damages by reason of the seizure, is a valid bond, though it lacks the condition for the indemnification of the sheriff called for by section 28, page 607, Wagner's Statutes; and the claimant may maintain an action on such bond. *Flint ex rel. Lumpkin v. Young*, 221.

4. ASSIGNMENT OF JUDGMENT: EXECUTION. Irregularity or invalidity in the assignment of a judgment will not impair the title of a purchaser at a sale under execution issued on the order of the assignee. *Emory v. Joice*, 537.

FENCE.

DAMAGE TO CROPS BY CATTLE. No action can be maintained for damage to crops by cattle trespassing, unless the field in which the crops are grown is inclosed with such a fence as is prescribed by section 2, Wag. Stat., page 706. *Mann v. Williamson*, 661.

FINE.

CIVIL ACTION TO RECOVER. See The State v. Ford, 469.

FORCIBLE AND UNLAWFUL ENTRY AND DETAINER.

UNLAWFUL DETAINER. In an action of unlawful detainer, there can be no recovery of any premises not described in the complaint. *Lamme v. Buse*, 463.

FRAUD.

1. NO DOWER IN LAND FRAUDULENTLY CONVEYED BY HUSBAND BEFORE MARRIAGE. A wife is not entitled to dower out of lands of her husband which, before her marriage, have been fraudulently conveyed to another, though the conveyance is subsequently set aside at the instance of creditors. *Gross v. Lange*, 45.

2. SALE OUT OF USUAL COURSE OF BUSINESS. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business, will not necessarily invalidate the sale. The question is one of fraud in fact, and is properly left to the jury. *The State ex rel. Peirce v. Merritt*, 275.

3. CHANGE OF POSSESSION. As against creditors a sale of goods will be held fraudulent and void unless the vendee takes and retains actual, visible and exclusive possession, such possession as to indicate to purchasers at large that the vendor no longer has control. *Ib.*

4. OPPORTUNITIES OF DISCOVERING. It is not the duty of the purchaser

to inquire into the motives of the seller for making the sale. Hence, he is not chargeable with knowledge of a fraudulent purpose on the part of the seller merely because he failed to avail himself of an opportunity of making investigations which, if made, would have revealed the purpose. *Ib.*

5. INSOLVENCY OF SELLER. Fraud in a sale cannot be inferred from the mere fact that the seller is insolvent. *Ib.*

6. SALE OUT OF ORDINARY COURSE: EVIDENCE: FRAUD: BANKRUPT LAW, NOT ADMINISTERED BY STATE COURT. The fact that a sale is made by a debtor out of the ordinary course of business, while it is a circumstance tending to prove fraud, will not warrant an instruction to the jury that the sale is *prima facie* fraudulent. Under section 35 of the bankrupt act such an instruction would be proper in proceedings instituted under that act in the Federal court; but in a suit in the State court the matters in dispute are to be determined, not by the bankrupt act, but by the common law and the statutes of the State. *Ib.*

UNDUE INFLUENCE. See Ford v. Hennessy, 580.

See Chouteau v. Allen, 290.

See Gillespie v. Stone, 505.

FRAUDULENT CONVEYANCE.

MORTGAGE OF STOCK IN TRADE: RETENTION OF POSSESSION WITH SALES BY MORTGAGEOR. A chattel mortgage executed by a firm of druggists and duly recorded, covering "all their stock of drugs and fixtures contained in their drug store," and containing a provision that upon default of payment of the debt the mortgageor might enter and take the property, and, upon giving a prescribed notice, sell the same, is not void upon its face, as a conveyance to the use of the mortgageor. It authorizes him to retain possession, but under section 8 of the statute concerning fraudulent conveyances, (Wag. Stat., p. 281,) this alone does not invalidate a recorded mortgage; and there is no implied reservation of a power of sale in the mortgageor growing out of the nature of the property, (overruling *Lodge v. Samuel*, 50 Mo. 204).

If sales have been made after the execution of such mortgage, it should be left to the jury to determine whether they were made in pursuance of an agreement or understanding between the parties. If they were, the mortgage would be fraudulent. *Weber v. Armstrong*, 217.

See The State *ex rel.* Peirce v. Merritt, 275.

GAMING.

GAMING ACT: "POKER:" NO JOINT LIABILITY OF PLAYERS FOR MONEY LOST. In the game of "poker" each party plays for himself. Therefore, under the gaming act, (Wag. Stat., § 1, 669,) if there be no conspiracy of two or more to cheat another player and no agreement to divide the winnings, a joint action cannot be maintained

against them by the loser to recover the amount of his losses. The action lies only against the winner. *Laytham v. Agnew*, 48.

DESTRUCTION OF GAMING DEVICES. See Lowry v. Rainwater, 152.

GUARANTY.

1. GUARANTY: PARTNERSHIP. It is no defense to an action on a guaranty given in favor of a firm that the credit asked for the firm was extended in the name of one of the members of the firm, if this is done with the consent of the other partners. *Shine's Administrator v. The Central Savings Bank*, 524.

2. ——: GENERAL RULES OF CONSTRUCTION. It is well settled that for the ascertainment of the intention of the guarantor the written guaranty must be looked to, and if there is room for doubt, or if uncertainty is to be found on the face thereof, the words used are to be received and accepted in the strongest sense against the party using them according to the maxim *verba fortius accipiuntur contra proferentem*. It is also equally well settled that when the intention is clearly expressed, or the terms of the guaranty are defined and ascertained, the liability of the guarantor cannot be extended beyond them by implication. *Ib.*

3. ——: CASE ADJUDGED. Plaintiff's intestate wrote to the president of the defendant bank as follows: Hearing from P. O'Neil and Mr. Doyle that they could use advantageously some additional cash over and above the amount already had in your bank, and being desirous to promote their interests and to enable them to carry on their business efficiently, I will thank you to submit to your board, that if they will lend to O'Neil & Co. $15,000, I shall hold myself responsible for that amount. * * If the Central (the bank) cannot conveniently make this advance, I will feel obliged to assist them in procuring it elsewhere. The bank had previously loaned O'N. & D. $10,000 on their indorsed note. On the day when this note became due, the above letter was presented to the bank, and on the strength of it the bank discounted a new note of O'N. & D. for $10,000, and placed the proceeds to their credit. They had already some money on deposit, but not enough to meet the maturing note. As soon as the new note was discounted, they drew a check against their deposit and in favor of the bank, and with it took up the maturing note. They afterwards obtained a further loan of $5,000 from the bank. The bank defending the present action on the ground that the deceased had become liable as guarantor for O'N. & D.; *Held*, that the letter contemplated an advance of $15,000 over and above what the bank had previously loaned O'N. & D.; that the transaction in relation to the notes amounted only to the substitution of one security for another, and did not constitute an additional advance of money; that the deceased, therefore, never became liable on his guaranty; and that this was true whether the bank made it a condition precedent to the new loan that the proceeds should be used in taking up the maturing note or not. *Ib.*

4. ——: RATIFICATION. Acts of acquiescence or ratification will not make one liable upon a written guaranty for things which do not come within the terms of the guaranty. *Ib.*

HANNIBAL (CITY OF).

See Frost v. Wilson, 664.

HOMESTEAD.

EFFECT OF CHANGE OF STATUTE: WIDOW'S RENUNCIATION OF HUSBAND'S WILL. The widow's right of homestead in her husband's lands becomes fixed upon his death, and is not affected by a subsequent change in the statute, occurring before she applies to have the homestead set apart. Nor does it matter that he left a will, by the terms of which, she took a different estate in the lands from what she would be entitled to under the homestead act, and she made no renunciation of its provisions until after the change in the statute, provided she did make a renunciation within twelve months after his death, as allowed by section 16 of the dower act, Wag. Stat., p. 541. *Register v. Hensley*, 189.

HOMICIDE.

1. INTENTIONAL. A homicide intentionally committed while resisting an assault by the person slain, cannot be manslaughter in the second degree. If an offense at all, it is murder in the second degree or manslaughter in the fourth degree. *The State v. Edwards*, 480.

2. HOMICIDE committed in the attempt to perpetrate robbery, arson, &c., is not necessarily murder. R. S. 1879, § 1232. *The State v. Earnest*, 520.

HUSBAND AND WIFE.

1. ENFORCEMENT OF AGREEMENT FOR A LIEN: VENDOR'S LIEN: REFORMING MARRIED WOMAN'S DEED. One H having contracted for the purchase of certain land, and being unable to pay the whole of the purchase money, plaintiff's testatrix advanced what was lacking, upon an agreement with H and his wife that she, the testatrix, should have security upon the land, and to that end that the same should be conveyed to plaintiff as trustee for her. As soon as the money was paid the land was conveyed by the vendor to Mrs. H, who, on the same day, intending to carry out the agreement, conveyed to plaintiff as trustee, by a deed in which, however, her husband did not join. In an action against H and wife to have a lien declared and enforced against the land for the purchase money so advanced; *Held*, 1st, that unless the deed to Mrs. H created in her a separate estate, her conveyance not joined in by her husband could not be made the basis of any action either at law or in equity, and hence the action could not be sustained as a proceeding to reform the deed to plaintiff; 2nd, that as the vendor had been paid in full and had executed a conveyance, no vendor's lien could arise; 3rd, that no equitable lien upon Mrs. H's interest in the land could arise out of the agreement for a lien, unless she had a separate estate; but 4th, the agreement, unless defeated by the statute of frauds, was good against H so far as his marital interest in the land was concerned. *Pearl v. Hervey*, 160.

2. WIFE'S PERSONALTY: INVESTED IN LAND IN HUSBAND'S NAME. Land bought by a husband with his wife's money, but in his own name and without any agreement that the purchase shall be for her sole and separate use, or that the title shall be taken in her name, will not be treated in equity as her property. *Kidwell v. Kirkpatrick*, 214.

3. ——: ——: ——. Money acquired by a married woman during coverture by her own frugality and industry, with the consent of her husband, is her own property, and if it is intrusted by her to him for investment, and is by him invested in land in his own name, the land will be treated in equity as hers. But the rule is otherwise where money so invested comes to a married woman during coverture by inheritance. Being a chose in possession, it becomes the husband's absolute property by reason of his marital right, even though he received it from her in the capacity of her agent. *Ib.*

4. MARRIED WOMAN'S DEED: IMPEACHMENT OF CERTIFICATE OF ACKNOWLEDGMENT. A certificate of acknowledgment of a married woman's deed made by a proper officer and in substantial compliance with law, is *prima facie* evidence of the acknowledgment; but it may be impeached, and for this purpose it is not necessary to show fraud or imposition practiced on the grantor. It will be sufficient to show that she was not examined separate and apart from her husband, or that she was not made acquainted with the contents of the instrument by the officer making the certificate. *Steffen v. Bauer*, 399.

5. ACTION FOR WIFE'S LAND: HUSBAND A COMPETENT WITNESS. In an action brought by husband and wife to set aside a deed of trust on the wife's land, the husband is not disqualified as a witness. His marital right in the property gives him such an interest as entitles him to testify on his own behalf. It is not material that his testimony will necessarily affect his wife's interest also. *Ib.*

6. DEED. A deed which is signed by both husband and wife, but in which the husband alone is named as grantor, conveys only his interest in the land. *McFadden v. Rogers*, 421.

7. EJECTMENT FOR WIFE'S LAND: HUSBAND ONLY PROPER PARTY DEFENDANT, WHEN. The wife is not a proper party defendant to an action of ejectment for land claimed by her under a deed which vests the title in her, but confers no separate estate; nor can she make herself such by claiming a separate estate in her answer. The husband's marital interest gives him the right to the possession, and he alone should be sued. *Wilson v. Garaghty*, 517.

8. ——: DEATH OF HUSBAND; WIFE'S SUBSEQUENT POSSESSION: APPEAL. Where judgment in ejectment goes against husband and wife jointly for land in which the husband has a marital interest as against her, and pending an appeal the husband dies, the suit abates as to him. After his death the possession becomes hers, but this will not support the pending judgment against her or authorize the rendition of a new one. *Ib.*

INCEST.

As long as section 6, chapter 206, Gen. Stat. 1865, page 816, was in force, incest was not an indictable offense. The law was otherwise previous to 1865, and the old law has been restored by the revision of 1879, § 1538. *The State v. Slaughter*, 484.

INSOLVENCY.

SET-OFF IN EQUITY: JUDGMENT: INSOLVENCY: PARTIES. Where two parties, one of whom is insolvent, hold a judgment against a third, and he has a judgment against the insolvent, a court of equity, to prevent injustice, will ascertain the interest of the insolvent plaintiff in the former judgment, and will set-off against his interest the judgment against him. To a proceeding instituted for this purpose the co-plaintiff of the insolvent is a necessary party. *Fulkerson v. Davenport*, 541.

See The State *ex rel.* Peirce v. Merritt, 275.

INSTRUCTIONS.

1. IF the prevailing party was entitled to his verdict without proof of fraud on the other side, the fact that one of the instructions submitted the question of fraud to the jury without any proof of fraud being given, will furnish no ground for setting aside the verdict. *Wright v. McPike*, 175.

2. JURY TRIAL IN EQUITY CASES: PEREMPTORY INSTRUCTIONS. In a suit for settlement of mutual accounts, since the parties are not entitled, as of course, to a jury, if one is called, the court may instruct them peremptorily what verdict they shall find. *Hess v. Miles*, 203.

3. INSTRUCTIONS not predicated on any evidence in the case, are properly refused. *Flint ex rel. Lumpkin v. Young*, 221.

4. IT is error to submit to the jury an issue of fact concerning which no allegation is made in the pleadings and no evidence is offered at the trial. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 252.

5. IMPEACHING TESTIMONY: PRACTICE, CRIMINAL. The court is not bound, in a criminal case, to instruct the jury as to the proper effect of testimony offered to impeach defendant's witnesses, unless an instruction is asked by the defendant. (Distinguishing *State v.*

6. IT is no error to refuse an instruction when the principle it announces is fully and clearly declared in one that is given. *Whetstone v. Shaw*, 575.

7. INTEREST: REMITTITUR. Error in an instruction authorizing the allowance of excessive interest will be cured by a *remittitur* of the excess. *Ib.*

8. IT is not error to refuse an instruction, the substance of which is embraced in one already given, or which assumes as a fact a matter

as to which the evidence is conflicting. *The Wyandotte, Kansas City & Northwestern Railway Company v. Waldo*, 629.

9. PRACTICE: EVIDENCE. Under the present system of practice it would be improper to instruct the jury that admissions made by the accused are regarded as the very weakest character of testimony, and should be received with the greatest caution. It is not for the court to instruct the jury as to the weight or sufficiency of evidence. *The State v. Bell*, 633.

INSURANCE.

1. LIFE INSURANCE: SUICIDE: SANE OR INSANE. It was provided in a policy of life insurance that in case of the death of the insured "by his own act or intention, whether sane or insane," the company should only be liable for the net value of the policy at that time. *Held*, that this provision embraced an intentional self-destruction by an insane man, provided the latter, at the time of causing his own death, was conscious of the physical nature and consequences of his act, and intended to destroy his life, though he was not conscious of the moral guilt or criminality of the act. *Adkins v. Columbia Life Insurance Company*, 27.

2. FIRE INSURANCE; MEANING OF "UNOCCUPIED." A policy of insurance upon a dwelling house contained a stipulation that if the premises should become unoccupied, the policy should be void. In an action on the policy it appeared that previous to the fire the assured left the house and went elsewhere to reside, taking part of her furniture with her and leaving the rest; that she left a man in possession with instructions to sleep in the house at night; that this man quit the premises several days before the fire, and did not return; and that no one was in the house when the fire occurred. *Held*, that the house was unoccupied within the meaning of the stipulation, and the policy was void. *Cook v. The Continental Insurance Company*, 610.

3. FIRE INSURANCE: LOSS PAYABLE TO THIRD PARTY: ASSIGNMENT OF INTEREST; EVIDENCE: REMOVAL OF INSURED BUILDING. One C took out a policy of insurance upon his dwelling house, described as being situate "on west side of King's highway, near present terminus of Lindell Avenue." Afterwards he borrowed money of F, and to secure its payment, gave a deed of trust upon his land, and caused the secretary of the insurance company to write on the face of the policy, "Loss, if any, made payable to F." He subsequently sold and conveyed the property to plaintiff subject to the incumbrance in favor of F, and on the same page of the company's policy register on which the particulars of the risk and policy were entered, he caused the following further entry to be made: "Transferred to G," (the plaintiff). Plaintiff subsequently removed the house to another site on the same tract, to which the foregoing description was equally applicable. In its new place the house was destroyed by fire. Plaintiff paid off the incumbrance and received the policy from F. In an action on the policy, *Held*, 1st, That the relation of insurer and insured continued between the company and C, notwithstanding the entry in the body of the policy making the loss payable to F, and that F's interest in the policy terminated when his debt was paid, and vested *eo instanti* in the plaintiff; 2nd, That the entry on the policy register being made at the instan

C tended to show that the company accepted plaintiff as the insured in place of C, not in place of F; 3rd, That the removal of the house did not avoid the policy, unless it changed the nature of the risk or increased it in degree, and whether it did or not, was a question of fact for the jury. *Griswold v. The American Central Insurance Company*, 654.

INTERPLEA.

See Wangler v. Franklin, 659.

JEOFAILS.

See The State v. Meek, 355.

JUDGMENT.

1. IN EJECTMENT: ESTOPPEL. A judgment in ejectment is no bar to a second action between the same parties for the same property, whether the titles and defenses in both actions be the same or not. *Kimmel v. Benna*, 52.

2. JUSTICE'S JUDGMENT, WHEN NOT IRREGULAR. A justice's judgment will not be held irregular because the docket entry fails to show that the justice heard evidence before rendering it; especially in a case where it appears by the admission of the defeated party that in point of fact witnesses were sworn and examined, and the judgment was given on their testimony. *Baker v. Baker*, 134.

3. JUDGMENT NUNC PRO TUNC. The fact that a judgment is not such a one as the statute authorizes will not warrant the entering of a proper judgment, at a subsequent term, *nunc pro tunc*. This can never be done without proof that the judgment entered is not the one rendered by the court. *Wooldridge v. Quinn*, 370.

4. REPLEVIN: FORM OF JUDGMENT IN. While a party to a replevin suit cannot be compelled to elect whether he will take the property or its value before the property has been delivered to the sheriff under the judgment of the court, yet, when he does so elect, after a verdict in his favor, the court may properly render a simple money judgment. *Ib.*

5. IMPEACHMENT OF JUDGMENT. One who buys land subject to the lien of a judgment, cannot impeach the judgment or avoid the lien on any ground which would not have availed the defendant to prevent the rendition of the judgment. *Stoutimore v. Clark*, 471.

6. PAROL EVIDENCE: RECORD ENTRY. Parol evidence is admissible to explain whether an ambiguous marginal entry upon the record of a judgment is an assignment or a satisfaction. *Emory v. Joice*, 537.

7. PRINCIPAL AND AGENT: ASSIGNMENT OF JUDGMENT. An assignment of a judgment made on the margin of the record by an agent in his own name, but by authority of the principal, is good to pass the equitable title at least. *Ib.*

8. ASSIGNMENT OF JUDGMENT: EXECUTION. Irregularity or invalidity in the assignment of a judgment will not impair the title of a purchaser at a sale under execution issued on the order of the assignee. *Ib.*

9. ——: NATIONAL BANK. A National bank has power to assign a judgment in its own favor. *Ib.*

10. JUSTICE'S JUDGMENT, NOT IMPEACHABLE COLLATERALLY. A judgment of a justice of the peace, regular on its face, cannot be impeached in a collateral proceeding by showing that the suit was instituted in a township where neither the defendant nor the plaintiff resided, and which did not adjoin the township in which defendant resided. *Fulkerson v. Davenport*, 541.

11. CONCLUSIVENESS OF FINAL SETTLEMENT. A final settlement of an administrator with the will annexed, has the force and effect of a judgment, and, until impeached and set aside in an appropriate proceeding, precludes any action upon the bond of the executor. The only exception to the rule of the conclusiveness which attends a final settlement, is that laid down in section 6, page 118, Wag. Stat. *Woodworth v. Woodworth*, 601.

ALLOWANCE OF, AGAINST ESTATE OF DECEDENT. See Ewing v. Taylor, 394.

SETTING OFF JUDGMENTS. See Fulkerson v. Davenport, 541.

JUDICIAL NOTICE.

BILL OF EXCEPTIONS: JUDICIAL NOTICE. This court cannot consider a bill of exceptions filed after the lapse of the term at which the motion for new trial was disposed of, unless the record shows that the filing was with consent of the adverse party. To determine whether it was filed after the term, judicial notice may be taken of the times fixed by statute for holding court. *The State v. Broderick*, 622.

JURISDICTION.

1. ATTACHMENT: INTERVENTION OF BANKRUPTCY PROCEEDINGS: JURISDICTION OF STATE COURT. After property of a debtor had been attached on the ground of fraudulent conveyance, proceedings in bankruptcy were instituted and pressed to an adjudication against the debtor, and the attached property was taken by the assignee out of the sheriff's hands. *Held*, that these facts did not oust the State court of its jurisdiction of an action on the attachment bond brought by the alleged fraudulent purchaser. *The State ex rel. Peirce v. Merritt*, 275.

2. FORECLOSURE OF MORTGAGE: JURISDICTION. Since the circuit court has general jurisdiction over the foreclosure of mortgages, objection to the jurisdiction, based upon the fact that the mortgaged premises are not situate in the county where the suit is brought, must be taken by a proper plea, and will be waived by pleading to the merits. *Chouteau v. Allen*, 290.

IN VENDOR'S LIEN CASES. See Ross v. Julian, 209.

JURY.

1. PRACTICE. It is not error for the court, in the temporary absence of the prosecuting attorney, to examine the jurors on the *voir dire*. *The State v. Ludwig*, 412.

2. COMPETENCY OF JURORS WHO HAVE FORMED AN OPINION. Several of the jurors, being examined on the *voir dire*, stated that they had formed and expressed opinions, which would require evidence to remove. They also stated that they knew nothing of the facts, and had not talked with any witness in the case; that their opinions were based upon what they had heard from others, and were not of such a character as would affect them in rendering a verdict; that they would be governed by the law and the evidence, and thought they could decide the case according to the law and the evidence. *Held*, that under section 13, page 1103, Wag. Stat., they were competent to sit upon the trial of the case. *The State v. Core*, 491.

3. TEMPORARY ABSENCE OF JUROR. The absence of a juror from the box for a few minutes during a temporary suspension of proceedings in a criminal case, will not vitiate the verdict. *The State v. Bell*, 633.

JURY TRIAL IN EQUITY CASES. See Hess v. Miles, 203.

JUSTICE'S COURT.

1. JUSTICE'S JUDGMENT, WHEN NOT IRREGULAR. A justice's judgment will not be held irregular because the docket entry fails to show that the justice heard evidence before rendering it; especially in a case where it appears by the admission of the defeated party that in point of fact witnesses were sworn and examined, and the judgment was given on their testimony. *Baker v. Baker*, 134.

2. APPEAL: WAIVER OF NOTICE. In order to constitute a waiver of the notice required by law to be given when an appeal is taken from a judgment of a justice of the peace, a notice to take depositions served upon the appellant after the case is in the appellate court, should appear to have been given by the appellee or his attorney. If this does not appear, and the depositions taken in pursuance of the notice have not been filed in court, it will not operate a waiver. *Wolff v. The Danforth Artificial Light Company*, 182.

3. REPLEVIN IN JUSTICE'S COURT. The statement filed in the present case (an action of replevin commenced before a justice of the peace), though not in the precise words of the form prescribed by the statute, (Wag. Stat., § 2, p. 817,) *Held*, sufficient; the departures are immaterial. *Berry v. Kauffman*, 186.

4. JUSTICE'S JURISDICTION: CIVIL ACTION TO RECOVER FINES. A statute which provides that in certain cases fines may be recovered by civil action to the use of the county before a justice of the peace, (Wag. Stat., § 29, p. 516,) does not authorize a proceeding before a justice of the peace founded on an affidavit charging, not a pecuniary liability, but a criminal offense, on which a warrant is issued, and the defendant is arrested and forcibly taken before the justice and fined. Such a proceeding is not a civil action. *The State v. Ford*, 469.

5. JUSTICE'S JUDGMENT NOT IMPEACHABLE COLLATERALLY. A judgment of a justice of the peace regular on its face, cannot be impeached in a collateral proceeding by showing that the suit was instituted in a township where neither the defendant nor the plaintiff resided, and which did not adjoin the township in which defendant resided. *Fulkerson v. Davenport*, 541.

6. STATEMENT: JURISDICTION: RAILROAD: DAMAGE TO CATTLE. The plaintiff's statement of his cause of action filed with the justice of the peace in the present case, (an action upon the statute to recover double damages for the killing of a heifer;) *Held*, to comply with the rule which requires the statement in this class of cases to show that the killing occurred in the township in which the justice resides and has jurisdiction. *Cummings v. The St. Louis, Iron Mountain & Southern Railway Company*, 570.

7. JUSTICE'S DOCKET, &C.: EVIDENCE. The identity of the docket and official papers of a justice of the peace may be established by the testimony of any competent witness. It is not necessary to call the justice. *The State v. Chambers*, 625.

8. JUSTICE'S DOCKET ENTRIES: EVIDENCE. The statute authorizing a certified transcript of justices' judgments to be received in evidence does not provide the only method of proving such judgments. The original entry on the justice's docket may be used. *Ib.*

9. CITY RECORDER EX-OFFICIO JUSTICE OF THE PEACE: CONSTITUTIONAL LAW. A provision in a city charter that the city recorder shall be *ex-officio* a justice of the peace within the limits of the city, does not violate any constitutional prohibition. *Frost v. Wilson*, 664.

10. LIEN OF JUSTICE'S EXECUTION: SUBSEQUENT ASSIGNMENT FOR BENEFIT OF CREDITORS. The lien of an execution in the hands of a constable holds good against a subsequent assignment for the benefit of creditors under the general assignment law. *Ib.*

LANDLORD AND TENANT.

1. LANDLORD, NOT LIABLE TO REBUILD FENCE, WHEN: DAMAGES. Where there was no agreement by the landlord to keep the premises in repair or fit for occupation, and where, before the tenancy began, the landlord had removed the fence from the front of the lot which had a perpendicular descent of seven or eight feet to the sidewalk, *Held*, that he was under no duty to the tenant to rebuild the fence, and, *a fortiori*, under none to a sub-tenant who became such without his knowledge or consent, and that he was not liable to a five or six year old child of such sub-tenant in an action for damages for injuries sustained by its fall from the lot to the sidewalk. *Peterson v. Smart*, 34.

2. LANDLORD NOT LIABLE TO REBUILD FENCE BECAUSE OF HIS TRESPASS IN REMOVING SAME DURING A PRIOR TENANCY. Although the landlord might have been guilty of trespass in removing the fence during a prior tenancy, during which the child's father was in possession of a portion of the premises as a sub-lessee, yet when the prior tenancy ceased and the father sub-let from the new tenant, *Held*, that it was as though the father had then, for the first time, occupied the premises, and that the landlord owed no duty to

the new tenant, nor to such sub-tenant, nor to any one else upon the premises by the invitation or permission of either, to rebuild such fence. *Ib.*

LANDS AND LAND TITLES.

TITLE TO CAIRO & FULTON RAILROAD LANDS: FORECLOSURE OF STATE'S LIEN. The lands granted to the State of Missouri by the United States by the act of Congress of February 9th, 1853, (10 U. S. Stat., 155,) and by the State appropriated to the construction of the C. & F. R. R. by the act of the Legislature of February 20 h, 1855, (Acts 1855, p. 314,) were subject to the lien reserved by the State in her own favor to secure the payment of the bonds issued by her for the benefit of that company, and passed to the purchaser at the foreclosure sale made in pursuance of the acts of February 19th and March 19th, 1866, (Acts 1866, pp. 107, 115).

The swamp lands which had been conveyed by the counties in payment of subscriptions to said company did not pass by said sale. *Chouteau v. Allen*, 290.

LARCENY.

1. INDICTMENT FOR PETIT LARCENY, SECOND OFFENSE: CRIMINAL PLEADING: "FELONIOUSLY." An indictment for a petit larceny charged to have been committed after discharge from imprisonment under a previous conviction for a similar offense, must, as in any other case of felony, allege that the larceny was feloniously committed. *The State v. Weldon*, 572.

2 EMBEZZLEMENT. Section 15, page 514, Wag. Stat., expressly authorizes a person indicted for larceny to be convicted of embezzlement. This statute was overlooked in *State v. Stone*, 68 Mo. 101, which case is, for that reason, overruled. *The State v. Broderick*, 622.

3. POSSESSION AS EVIDENCE OF OWNERSHIP: LARCENY: INSTRUCTION. Possession of personal property is presumptive evidence of ownership If, therefore, one finds a mule in the possession of another, who claims ownership, and in good faith he buys the mule, he cannot be convicted of larceny, though the mule was stolen and the person from whom he bought was a stranger to him.

The judgment in this case was reversed for failure of the trial court to instruct the jury to this effect, though an instruction was given that they were not to convict unless they believed beyond a reasonable doubt that defendant did steal the mule, and unless the evidence excluded every other hypothesis than guilt. *The State v. Boone*, 649.

LIEN.

1. ENFORCEMENT OF AGREEMENT FOR A LIEN: VENDOR'S LIEN: REFORMING MARRIED WOMAN'S DEED. One H having contracted for the purchase of certain land, and being unable to pay the whole of the purchase money, plaintiff's testatrix advanced what was lacking, upon an agreement with H and his wife that she, the testatrix, should have security upon the land, and to that end that the same should be conveyed to plaintiff as trustee for her. As soon as the money

was paid the land was conveyed by the vendor to Mrs. H, who, on the same day, intending to carry out the agreement, conveyed to plaintiff as trustee, by a deed in which, however, her husband did not join. In an action against H and wife to have a lien declared and enforced against the land for the purchase money so advanced; *Held*, 1st, that unless the deed to Mrs. H created in her a separate estate, her conveyance not joined in by her husband could not be made the basis of any action either at law or in equity, and hence the action could not be sustained as a proceeding to reform the deed to plaintiff; 2nd, that as the vendor had been paid in full and had executed a conveyance, no vendor's lien could arise; 3rd, that no equitable lien upon Mrs. H's interest in the land could arise out of the agreement for a lien, unless she had a separate estate; but 4th, the agreement, unless defeated by the statute of frauds, was good against H so far as his marital interest in the land was concerned. *Pearl v. Hervey*, 160.

2. IMPEACHMENT OF JUDGMENT. One who buys land subject to the lien of a judgment, cannot impeach the judgment or avoid the lien on any ground which would not have availed the defendant to prevent the rendition of the judgment. *Stoutimore v. Clark*, 471.

EXTINGUISHMENT OF, BY TENDER OF DUES. See Berry v. Tilden, 489.

LIMITATIONS.

1. STATUTE OF LIMITATIONS: ACKNOWLEDGMENT OF DEBT. No acknowledgment of a debt, which is not made to some person, will interrupt the running of the statute of limitations. *So held* of an acknowledgment contained in a writing which, after the death of the debtor, was found among his papers, signed by him and purporting to be his will, but never attested. *Allen v. Collier*, 138.

2. STATUTE OF LIMITATIONS: FRAUD: PLEADING: PLEDGE. The statute of limitations cannot be invoked in behalf of a title fraudulently acquired in violation of a trust, nor will it be allowed if it is not pleaded, nor does it run against a pledger as long as the pledge continues. *Chouteau v. Allen*, 290.

3. ADMINISTRATION: JUDGMENT: LIMITATIONS. No judgment is too old to be allowed against the estate of a decedent until the time has elapsed since its rendition, which the law designates as the period when presumption of payment may be indulged. R. S. 1879, § 3251. *Ewing v. Taylor*, 394.

4. BACK TAX ACT. No action under the back tax act of 1877, for the collection of taxes more than five years delinquent, was barred by the statute of limitations, if it was brought within five years from March 31st, 1875, the date of the passage of the back tax act of that year. Sess. Acts 1875, p. 82. *The State to the use of Rosenblatt v. Heman*, 441.

5. STATUTE OF LIMITATIONS: STATUTE OF FRAUDS: TRUSTS. Neither the statute of frauds nor the statute of limitations can be interposed to prevent the enforcement of an agreement made by a purchaser at execution sale to permit the execution defendant to redeem. *Gillespie v. Stone*, 505.

PUBLIC ROADS: TITLE BY USER. Ten years adverse occupancy and use of a road by the public, acquiesced in by the owner, will vest in the public an easement in the road and cause it to become a highway. *The State v. Wells*, 635.

MANDAMUS.

TO ENFORCE CORPORATE DUTY. See City of St. Louis v. St. Louis Gaslight Company, 69.

MANSLAUGHTER.

1. INTENTIONAL HOMICIDE. A homicide intentionally committed while resisting an assault by the person slain, cannot be manslaughter in the second degree. If an offense at all, it is murder in the second degree, or manslaughter in the fourth degree. *The State v. Edwards*, 480.

2. MANSLAUGHTER. Where there is a willful killing without deliberation, and not with malice aforethought, the offense is manslaughter, but whether in the second or fourth degree will depend upon whether the facts bring the killing within the 12th or the 18th section of the chapter on homicide. *The State v. Curtis*, 594.

See The State v. Ludwig, 412.

MAXIMS.

VERBA FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM. See Shine's Administrator v. The Central Savings Bank, 524.

MISTAKE.

MISTAKEN POSSESSION, WHEN ADVERSE. Where the owner of a tract of land takes into his inclosure adjoining land which does not belong to him, the possession of the latter will be deemed adverse to the true owner if it is held under the belief that the land lies within the bounds of his own tract, and without any purpose of surrendering it to the true owner when the true line shall be ascertained. *Cole v. Parker*, 372.

MUNICIPAL CORPORATION.

1. CITY ORDINANCE: EVIDENCE OF APPROVAL BY THE MAYOR. The validity of an ordinance admitted to have been passed by the city council of the city of St. Joseph being denied on the ground that the mayor had never approved it, and no copy with his signature attached being found among the city records, it was shown by the testimony of the mayor that he had desired the passage of the ordinance, and his impression was that he had signed it. It was also shown that it was recorded in a book kept by the city in which ordinances passed and approved were entered. The charter required this book to be kept, but did not require the mayor to sign the record. It was, however, the practice, but not the uniform practice to sign. The

present ordinance was not signed in this book. It was also shown that this ordinance was published in the official newspaper of the city as an ordinance passed by the council and approved by the mayor; that the proper officer of the city received, filed and kept a certified copy of a resolution of a railroad company accepting a grant of privileges conferred by the ordinance, and that the company had availed itself of the grant by laying down its track on one of the streets of the city, and using the same with the knowledge of the city officials and without objection from them. *Held*, that this was sufficient evidence of the approval of the ordinance. *Knight v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 231.

2. CONDITION SUBSEQUENT: RAILROAD RIGHT OF WAY: CITY ORDINANCE. A city ordinance granting to a railroad company a right of way over a street provided that the grant should become null and void if the company should ever remove its machine shops from the city. *Held*, that this was a condition subsequent, in which no one had any legal interest but the company and the city, and if the company violated the condition by removing the shops, this did not *ipso facto* terminate the right of way so as to entitle the owner of a lot abutting upon the street to maintain an action of damages against the railroad company as for an unlawful occupation of the street. *Ib.*

3. CITY RECORDER EX-OFFICIO JUSTICE OF THE PEACE: CONSTITUTIONAL LAW. A provision in a city charter that the city recorder shall be *ex-officio* a justice of the peace within the limits of the city, does not violate any constitutional prohibition. *Frost v. Wilson*, 664.

4. HANNIBAL CITY RECORDER: CONSTITUTIONAL LAW: TITLE OF ACT. The title "An act to consolidate into one the various acts in relation to the charter of the city of Hannibal," is sufficiently comprehensive to embrace a section creating the office of recorder and vesting the recorder with the powers of a justice of the peace within the limits of the city. Acts 1873, p. 249, § 20. *Ib.*

ST. LOUIS VEHICLE LICENSE ORDINANCE. See City of St. Louis v. Green, 562.

MURDER.

1. EVIDENCE OF IDENTITY. If the evidence given upon a trial for murder shows that the person killed bore the same name as that alleged in the indictment as the name of the victim, no other proof of identity need be given. *The State v. Kilgore*, 546.

2. ———. Certain instructions in relation to murder are examined and construed, and held to conform to the settled rulings of this court. *Ib.*

3. MURDER BY LYING IN WAIT. Under an indictment for murder, the accused may be convicted on proof that he lay in wait and killed the deceased, although the lying in wait is not alleged in the indictment.

An instruction in relation to this offense need not define the term "lying in wait." *Ib.*

4. GOOD CHARACTER. If all the evidence in the case, including de-

fendant's evidence of good character, shows him to be guilty, his character cannot justify, excuse, palliate or mitigate the offense. *Ib.*

5. MURDER IN THE FIRST DEGREE. One who seeks out another and shoots and kills him on account of an old grudge and in retaliation, and not in the proper and necessary defense of his person, is guilty of murder in the first degree. *Ib.*

6. INSTRUCTIONS ON A MURDER TRIAL. When the evidence admits of but two theories, one that defendant was guilty of deliberate murder, and the other that he took the life of the deceased in self-defense, the court is not authorized to instruct the jury in relation to manslaughter in any degree. *Ib.*

7. EVIDENCE: MURDER. Statements of the deceased are not binding upon the State in a trial for murder as admissions of a party to the record, and if not receivable on the footing of dying declarations or as part of the *res gestae*, must be excluded. *The State v. Curtis*, 594.

8. FIRST DEGREE. Where there is a willful killing with malice aforethought and deliberation, that is, with malice and premeditation, in a cool state of the blood, the offense is murder in the first degree. This definition does not include cases in which specific acts are by statute made murder in the first degree. *Ib.*

9 SECOND DEGREE. Where there is a willful killing with malice aforethought, that is, with malice and premeditation, but not with deliberation, or in a cool state of the blood, the offense is murder in the second degree. No homicide can be murder in the second degree unless the act causing death was committed with malice aforethought, that is, with malice and premeditation. *Ib.*

10. MANSLAUGHTER. Where there is a willful killing without deliberation, and not with malice aforethought, the offense is manslaughter, but whether in the second or fourth degree will depend upon whether the facts bring the killing within the 12th or the 18th section of the chapter on homicide. *Ib.*

11. EVIDENCE: STATEMENT OF DEFENDANT IN A MURDER CASE. Where a statement made by the defendant in relation to a homicide charged against him is offered in evidence by the State, the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the State is entitled to the benefit of anything he said against himself. The latter the law presumes to be true; the former the jury are not bound to believe because said in a conversation proved by the State; they may believe or disbelieve it as it is shown to be true or false by all the evidence in the case. *Ib.*

12. MURDER: PRESUMPTION OF MALICE. If a homicide is shown to have been committed willfully, premeditatedly and deliberately, with means and instruments likely to produce death, the malice requisite to make the offense murder will be presumed. *Ib.*

See The State v. Ludwig, 412.

See The State v. Edwards, 480.

NATIONAL BANK.

A National bank has power to assign a judgment in its own favor. *Emory v. Joice*, 537.

NEGLIGENCE.

1. NEGLIGENCE OF RAILROAD COMPANY: ESCAPE OF SPARKS: SUFFICIENCY OF EVIDENCE. In an action against a railroad company to recover damages for injury to plaintiff's farm by fire, alleged to have been communicated through the negligence of the company's servants, by sparks emitted from a locomotive, the evidence as to the origin of the fire showed only that just after a train of cars on defendant's road had passed through plaintiff's farm, smoke was seen coming down the railroad, and immediately the fire which did the damage broke out in plaintiff's field within one hundred feet of the railroad track. *Held*, that this was sufficient to warrant the submission of the case to the jury without direct evidence that any sparks escaped from the locomotive. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 243.

2. ———: ———: PRIMA FACIE CASE: EVIDENCE IN REBUTTAL. Since the decision in *Fitch v. Pacific R. R. Co.*, 45 Mo. 322, it has been uniformly held that a *prima facie* case is made out against a railroad company when it is proved that the fire which did the damage was communicated by sparks from a locomotive attached to a passing train, and that it then devolves upon the company to show that the escape of sparks was not the result of negligence on its part. To this end it may show that the engine and machinery were of the most improved pattern and make, and were managed by careful and competent servants in a skillful and careful manner. Evidence that the company's servants were careful and competent men will not of itself be sufficient to rebut the presumption of negligence on their part, but may be submitted to the jury, in connection with other facts, to enable them to determine whether, on the particular occasion in question, they were managing the engine carefully and skillfully. *Ib.*

3. NEGLIGENCE OF RAILROAD COMPANY: ESCAPE OF SPARKS. If sparks escaping from a railroad locomotive kindle a fire upon the company's right of way, and the fire extends to and destroys adjoining property, the loss is *prima facie* the result of the company's negligence. The liability incurred will not be avoided by showing that the spread of the fire was caused by the wind, or that there was no considerable accumulation of combustible material on the right of way. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 252.

4. ESCAPE OF SPARKS: FAILURE OF COMPANY'S SERVANTS TO EXTINGUISH FIRE. The employees of a railroad company do not, by reason merely of their employment, owe any duty to the proprietors of lands adjoining the company's right of way to extinguish a fire found on the right of way. If they omit to do so, and the fire extends to adjoining property and does injury, the company is not liable unless the fire originated through its negligence. *Ib.*

5. RAILROAD: NEGLIGENCE. Persons to whom the management of a

railroad is intrusted are bound to exercise the strictest vigilance in carrying passengers to their destinations, and setting them down safely; and the company is responsible for want of care and foresight on their part in doing it, but not for any damages to which passengers may expose themselves by their own recklessness or carelessness. If a passenger be negligently carried beyond his stopping place, he can recover for the inconvenience, loss of time and expense of traveling back, but if he jumps or leaves the train under circumstances which prudence would forbid, he does it at his own risk and assumes the consequences of his own act. *Kelly v. The Hannibal & St. Joseph Railroad Company*, 604.

NOTICE.

1. EQUITY: PURCHASE WITH KNOWLEDGE OF FORMER SALE. A purchaser of school land who pays the purchase money but fails to get a patent from the county, will be entitled to the benefit of one issued to a person who buys at a subsequent sale of the same land with knowledge of the former sale. Equity will decree the title divested out of the patentee and vested in the first purchaser. *Barksdale v. Brooks*, 197.

2. PROMISSORY NOTE: FRAUD: EVIDENCE OF NOTICE. The indorsee of a promissory note before taking it, was informed by the maker that it would be good "if the consideration for which it was given has not been misrepresented; this is not tested yet." *Held*, that he thereby became chargeable with notice that the validity of the note was a question which remained to be tested, and if it was procured by fraud or misrepresentation, he could not enforce it. *Studebaker Manufacturing Company v. Dickson*, 272.

3. CORPORATION: NOTICE OF UNAUTHORIZED ACTS OF OFFICERS: EFFECT OF ACQUIESCENCE. Notice to the officers of a corporation of the unauthorized acts of their predecessors in office is notice to the corporation, and if no dissent is expressed, ratification will be presumed, and the acts will become binding upon the corporation and its stockholders. *Chouteau v. Allen*, 290.

4. PRINCIPAL AND AGENT: AGENT'S KNOWLEDGE. The rule that the knowledge of the agent affects the principal, is applicable not only to knowledge acquired during the continuance of the agency, but to such as was acquired so shortly before it began as necessarily to give rise to the inference that it remained fixed in the mind of the agent during his employment. *Ib.*

WAIVER OF NOTICE OF APPEAL. See Wolff v. The Danforth Artificial Light Company, 182.

OF SALE OF PLEDGED PROPERTY. See Chouteau v. Allen, 290.

NUISANCE.

1. NUISANCE: DAMAGE TO LAND: REMEDY, WHEN BY SINGLE ACTION, WHEN BY SUCCESSIVE ACTIONS. The rule is well settled that when an injury to land occasioned by the commission of a nuisance is of a permanent character, and goes to the entire value of the estate, recovery for the whole injury should be had in a single suit, and a

second action cannot be maintained for its continuance. But this rule does not apply to a case where, by reason of the diversion of a stream of running water the plaintiff's land is annually overflowed and his crops injured. Such injury does not go to the entire value of the estate, but being of yearly recurrence, is susceptible of periodical apportionment, and may, therefore, be redressed by successive actions. *Van Hoozier v. Hannibal & St. Joseph Railroad Company*, 145.

2. LANDLORD AND TENANT: DAMAGES: PARTIES. A landlord entitled by the terms of the lease to a share of the crop as rent, may maintain an action for damages to the crop by a nuisance; and if no objection is made for non-joinder of the tenant as co-plaintiff, he may sue alone, and his recovery will be apportioned according to his interest. *Ib.*

3. COLLECTION AND DISCHARGE OF WATER UPON NEIGHBORING LANDS. A land owner has no right to concentrate into one stream the water coming upon his own land and discharge it upon his neighbor's. Even if it would naturally flow in that direction, the concentration would necessarily increase the injury, and for this an action would lie. *McCormick v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 359.

4. CASE ADJUDGED. A railroad company, in constructing its road across a basin-shaped piece of low land, raised an embankment with a culvert or water-way, through which water, collected on one side of the road from the adjacent high lands and from the overflow of a neighboring creek, escaped to the other side and damaged the adjoining premises. *Held*, that the company was liable; and so far as the overflowed water from the creek contributed to the injury, the liability was the same, whether the overflow was caused by the act of the company in building a bridge over the creek too narrow for the volume of water or not. *Ib.*

PARTIES.

1. DEFECT OF PARTIES. The objection of defect of parties, if it appears on the face of the petition, should be raised by demurrer, if it does not so appear, by answer, and if not so raised it will be deemed waived. *Donnan v. The Intelligencer Printing & Publishing Company*, 168.

2. PARTNERSHIP: ATTACHMENT BOND. Where goods are sold to an individual and are afterwards attached as the property of the seller, and upon claim being made by the vendee, an attachment bond is given for his benefit, he is the proper party to sue on the bond, and not a firm of which he is a member, notwithstanding the goods may have been bought on account of the firm and been paid for by them. *The State ex rel. Peirce v. Merritt*, 275.

3. ACTION: EQUITY: PARTIES. Plaintiff borrowed of C upon his note and mortgage, $5,000, of which sum it was agreed that plaintiff should receive $2,500, and the other $2,500 should be held to pay off an existing mortgage upon plaintiff's land when it should become due. The money was, by agreement, placed with the defendant bank, by whom $2,500 was paid to plaintiff, and the remainder was placed to the credit of one M, who converted it to his own use. The $2,500 mortgage coming due, C, to protect himself, bought it in and held it as a charge against the plaintiff and his land, and to indemnify

himself, obtained further security from M. In an action against the bank, plaintiff obtained judgment for the money placed to the credit of M, with interest; *Held*, that this was error, as plaintiff was in no event entitled to have this money; *Held, further*, that in order to a complete adjustment of all the equities, C and M should be made parties to the suit. *Judy v. Farmers & Traders Bank*, 407.

4. JOINT CONTRACT: PARTY TO SUIT: DISCHARGE OF OBLIGATION. One of two obligees in a joint contract cannot sue upon the contract alone. Payment in full by the obligor to one of the joint obligees discharges the obligation. *Henry v. Mount Pleasant Township of Bates County*, 500.

UNDUE INFLUENCE: SUIT TO SET ASIDE GIFT: PARTIES PLAINTIFF: ADMINISTRATION. The heirs, and not the administrator, are the proper parties to a suit to set aside a gift made by the deceased while *in extremis* as having been obtained of him by undue influence. *Ford v. Hennessy*, 580.

6. UNDUE INFLUENCE: SUIT TO SET ASIDE GIFT: PARTIES DEFENDANT. One who without consideration receives the benefit of a gift obtained by another through undue influence, is liable to an action for restitution; but not one whose only connection with the transaction is that he received the property and delivered it to the ultimate beneficiary. *Ib.*

TO FORECLOSURE SUITS. See Chouteau v. Allen, 290.

HUSBAND ALONE. TO BE SUED FOR WIFE'S LAND, WHEN. See Wilson v. Garaghty, 517.

TO SUIT FOR ALLOWANCE OF SET-OFF. See Fulkerson v. Davenport, 541.

TO SUIT ON EXECUTOR'S BOND. See Woodworth v. Woodworth, 601.

PARTNERSHIP.

1. ACKNOWLEDGMENT OF PARTNERSHIP INSTRUMENT. A certificate of acknowledgment of an instrument executed in the name of a firm, should show by which member of the firm the signature was made and acknowledged. If the signing and acknowledgment purport to have been done by the firm and in the firm name, the instrument will not be entitled to record. *Sloan v. The Owens, Lane & Dyer Machine Company*, 206.

2. GUARANTY: PARTNERSHIP. It is no defense to an action on a guaranty given in favor of a firm that the credit asked for the firm, was extended in the name of one of the members of the firm, if this is done with the consent of the other partners. *Shine's Administrator v. The Central Savings Bank*, 524.

3. SET-OFF: PARTNERSHIP. A debt due a partnership cannot be set-off against a debt due by an individual partner. *Weil v. Jones*, 560.

4. DISSOLVED PARTNERSHIP: REMEDY OF LATE PARTNERS. Where a partnership has been dissolved and the partners have accounted with each other as to everything except one item, one may maintain

an action at law against the other for his share of that item. *Whetstone v. Shaw*, 575.

5. ——: ——: PRACTICE. Even if a proceeding in equity for an accounting were the plaintiff's proper remedy, yet if the case was tried in the lower court by both parties on the theory that an action at law was the proper remedy, it is too late to raise an objection on that score for the first time when the case has reached the Supreme Court. *Ib.*

WHEN A FIRM ARE NOT PROPER PARTIES TO A SUIT. See State *ex rel.* Peirce v. Merritt, 275.

PERSONAL INJURIES.

See Kelly v. Hannibal & St. Joseph Railroad Company, 604.

PLEADING.

1. DEFECT OF PARTIES. The objection of defect of parties, if it appears on the face of the petition, should be raised by demurrer, if it does not so appear, by answer, and if not so raised it will be deemed waived. *Donnan v. The Intelligencer Printing and Publishing Company*, 168.

2. RAILROAD: DAMAGE TO CATTLE: ACTION UNDER 43RD SECTION. In an action against a railroad company, for injury to cattle, brought before a justice of the peace under section 43 of the railroad law, (Wag. Stat., 310,) the statement must show that the injury was occasioned by the failure of the company to erect and maintain good and substantial fences along the sides of its road. *Cunningham v. The Hannibal & St. Joseph Railroad Company*, 202.

3. Material facts should be distinctly and not inferentially alleged. The court will not supply by intendment an averment which the pleader has failed to make. *Cook v. Putnam County*, 668.

IN ABATEMENT. See Beattie v. Stocking, 196.

IN FORECLOSURE OF MORTGAGE. See Chouteau v. Allen, 290.

STATUTE OF LIMITATIONS MUST BE PLEADED. See Chouteau v. Allen, 290.

PLEADING, CRIMINAL.

1. ABORTION. An indictment for procuring an abortion is bad if it does not aver that the abortion was not advised by a physician to be necessary to preserve the life of the woman. Wag. Stat., § 34, p. 450. *The State v. Meek*, 355.

2. JEOFAILS. The provision of the statute of jeofails that "no indictment shall be deemed invalid * * for want of the averment of any matter not necessary to be proved," (Wag. Stat., § 27, p. 1090,) applies only to averments of such matters as are not necessary constituents of the crime charged, not to such as are essential but need no proof on the part of the State in the first instance, because there is a legal presumption of their existence. *Ib.*

3. RESISTING LEGAL PROCESS: SUFFICIENCY OF INDICTMENT. An indictment for resisting service of a warrant of arrest, is not bad because it fails to charge in express terms that the officer had the warrant in his possession at the time the resistance was offered. *The State v. Estis*, 427.

4. ———: ASSAULT. An indictment which charges that the defendant did obstruct, resist and oppose an officer attempting to effect his arrest "by making an assault," and did then and there shoot at the officer with certain pistols loaded with gunpowder and leaden balls, is not bad because the assault is not charged to have been made with a deadly weapon. The other facts stated make it good under section 29, page 449, Wag. Stat., without any express charge of assault. *Ib.*

5. ———: CERTAINTY OF CHARGE AS TO TIME. An indictment for resisting arrest charged that on the 6th day of November, 1876, a warrant was issued for the arrest of defendant upon a charge that on the 26th day of October previous, he had obtained certain goods under false pretenses, that an officer, on the 20th day of January, 1879, proceeded to make the arrest, and that defendant *then and there* resisted arrest. *Held*, not bad for uncertainty as to the time when the resistance was made. *Ib.*

6 INDICTMENT: EVIDENCE: VARIANCE. An indictment contained what purported to be a *verbatim* copy of a warrant for the arrest of defendant for obtaining goods under false pretenses. The warrant offered in evidence charged the defendant with obtaining goods "*unde fales pretens.*" *Held*, that the variance was immaterial both at common law and under section 22, page 1089, Wag. Stat. *Ib.*

7. RESISTING ARREST: EVIDENCE. An indictment for resisting arrest under a warrant, need not show to whom the warrant was delivered by the officer who issued it; nor need this be shown at the trial. It is immaterial through what agency it reaches the hands of the officer whose duty it is to serve it. *Ib.*

8. BY mistake in drawing an indictment for murder, the name of the person slain was substituted for that of the defendant, whereby it was made to allege a mortal wounding of the deceased by himself. *Held*, a fatal and incurable error. *The State v. Edwards*, 480.

9. INDICTMENT FOR PETIT LARCENY, SECOND OFFENSE: CRIMINAL PLEADING: "FELONIOUSLY." An indictment for a petit larceny charged to have been committed after discharge from imprisonment under a previous conviction for a similar offense, must, as in any other case of felony, allege that the larceny was feloniously committed. *The State v. Weldon*, 572.

PLEDGE.

1. NOTICE OF SALE: WAIVER. It is the general rule that the pledgee of personal property, before selling, must demand payment of the pledger or give him notice of the time and place of the intended sale, but this rule may be waived by agreement between the parties, and it has no application in cases where by the contract a definite time is fixed for the payment of the debt. In either of these cases sale may be made without notice or demand. *Chouteau v. Allen*, 290.

2. Where bonds are pledged as security for the payment of a note which is in turn pledged as security for the payment of acceptances, the time when the pledgee may sell the bonds is determined by the maturity of the note and not of the acceptances. *Ib.*

3. SALE BY PLEDGEE TO HIMSELF. It is the general rule that a pledgee cannot buy at his own sale of the pledged property, but this rule may be waived by express agreement of the parties. *Ib.*

4. ASSIGNMENT BY PLEDGEE. A pledgee can ordinarily convey no greater right to the pledged property than he himself possesses. If it is non-negotiable paper, it will be subject to the same defenses in the hands of the assignee as in his own. *Ib.*

5. STATUTE OF LIMITATIONS: FRAUD: PLEADING: PLEDGE. The statute of limitations cannot be invoked in behalf of a title fraudulently acquired in violation of a trust, nor will it be allowed if it is not pleaded, nor does it run against a pledger as long as the pledge continues. *Ib.*

6. PLEDGE OF CORPORATE ASSETS BY DIRECTORS TO THEMSELVES. Any attempt by the directors of a corporation to make a pledge of the assets of the corporation in favor of themselves, will be scrutinized by a court of equity with the most rigorous and jealous observation. *Ib.*

POWER OF ATTORNEY.

SEE ATTORNEY.

PRACTICE.

1. AFFIDAVIT FOR APPEAL. Where the trial court allowed the appellant ten days time in which to file his bill of exceptions and affidavit for appeal, and the latter was not filed until after that time had elapsed, but there was nothing in the record to show that it was not filed during the same term; *Held*, that there was no ground for dismissing the appeal. *Pershing v. Canfield*, 140.

2. JURY TRIAL IN EQUITY CASES: PEREMPTORY INSTRUCTIONS. In a suit for settlement of mutual accounts, since the parties are not entitled, as of course, to a jury, if one is called, the court may instruct them peremptorily what verdict they shall find. *Hess v. Miles*, 203.

3. A SHERIFF'S RETURN upon a writ of summons showing that he has executed the writ by leaving a copy of the writ and petition "at the usual place of abode, *when in the city of Cape Girardeau*, of the within named defendant, with a person of *the* family over the age of fifteen years," is bad, and a judgment by default rendered on such return is a nullity. *Brown v. Langlois*, 226.

4. FORECLOSURE OF MORTGAGE: PRACTICE AND PLEADINGS. If a party to a foreclosure proceeding in his pleadings claims the ownership of bonds secured by the mortgage, it is error to enter up a decree in his favor as pledgee. *Chouteau v. Allen*, 290.

5. JUDGMENT NUNC PRO TUNC. The fact that a judgment is not such

a one as the statute authorizes will not warrant the entering of a proper judgment, at a subsequent term, *nunc pro tunc*. This can never be done without proof that the judgment entered is not the one rendered by the court. *Wooldridge v. Quinn*, 370.

6. INTEREST: REMITTITUR. Error in an instruction authorizing the allowance of excessive interest will be cured by a *remittitur* of the excess. *Whetstone v. Shaw*, 575.

7. DISSOLVED PARTNERSHIP: REMEDY OF LATE PARTNERS. Where a partnership has been dissolved and the partners have accounted with each other as to everything except one item, one may maintain an action at law against the other for his share of that item. *Ib.*

8. ———: ———: PRACTICE. Even if a proceeding in equity for an accounting were the plaintiff's proper remedy, yet if the case was tried in the lower court by both parties on the theory that an action at law was the proper remedy, it is too late to raise an objection on that score for the first time when the case has reached the Supreme Court. *Ib.*

9. ADMINISTRATION: PARTY. A suit on the bond of an executor or administrator can only be maintained in the name of the State to the use of the party aggrieved; not in the name of the latter alone. *Woodworth v. Woodworth*, 601.

10. NON-SUIT. The court should not take the case from the jury if there is any evidence, however slight, tending to sustain the allegations of the petition. *Kelly v. The Hannibal & St. Joseph Railroad Company*, 604.

11. REFEREE'S REPORT. The court is not bound to adopt or reject the report of a referee *in toto;* but may adopt it with modifications. *Smith v. Paris*, 615.

SEVERAL ACTIONS ON ONE OBLIGATION. See Knox County Savings Bank v. Cottey, 150.

IN ATTACHMENT. See Beattie v. Stocking, 196.

REFRESHING WITNESS' MEMORY. See Steffen v. Bauer, 399.

AMENDMENT. See The Weed Sewing Machine Company v. Philbrick, 646.

PRACTICE, CRIMINAL.

1. VARIANCE IN NAME: EVIDENCE: PRACTICE. Where the court which tried an indictment for assault, has expressly found a variance between the real name of the party assaulted and the name as given in the indictment, to be immaterial and not prejudicial to the defendant, the Supreme Court will not set aside a judgment of conviction. Under the statute, (Wag. Stat., § 22, p. 1089,) the trial court is the judge of the materiality of the discrepancy. *The State v. Wammack*, 410.

2. ———: GRAND JURY: EVIDENCE. When such a discrepancy has

been shown to exist, it is not admissible to show by the testimony of a member of the grand jury who was meant by that body. *Ib.*

3. It is not error for the court, in the temporary absence of the prosecuting attorney, to examine the jurors on the *voir dire*. *The State v. Ludwig*, 412.

4. Evidence. A judgment will not be reversed for error of the trial court in excluding evidence when the jury has found the fact which the evidence tended to prove. *Ib.*

5. Remarks of prosecuting attorney. During the argument the prosecuting attorney made use of the remark: "Malice may bud and bloom in a man's heart almost in a moment, or in a short time." *Held*, that this afforded no ground for reversing the judgment. *The State v. Estis*, 427.

6. Sentence upon general verdict. A general verdict of guilty upon an indictment in several counts, all relating to the same transaction, but charging different degrees of the same offense, will sustain a sentence for the highest degree charged, especially in a case where all the evidence shows that the offense could only have been of that degree, and the instructions relate only to that degree. *The State v. Core*, 491.

7. Competency of jurors who have formed an opinion. Several of the jurors, being examined on the *voir dire*, stated that they had formed and expressed opinions, which would require evidence to remove. They also stated that they knew nothing of the facts, and had not talked with any witness in the case; that their opinions were based upon what they had heard from others, and were not of such a character as would affect them in rendering a verdict; that they would be governed by the law and the evidence, and thought they could decide the case according to the law and the evidence. *Held*, that under section 13, page 1103, Wag. Stat., they were competent to sit upon the trial of the case. *Ib.*

8. Witness: practice, criminal. It has never been determined by this court that the State is bound to call as witnesses upon a trial for murder, all persons who were present at the homicide; but if such be the law, it imposes no duty to call a person whose presence is denied by the State. *The State v. Kilgore*, 546.

9. Practice: instructions: evidence. Under the present system of practice it would be improper to instruct the jury that admissions made by the accused are regarded as the very weakest character of testimony, and should be received with the greatest caution. It is not for the court to instruct the jury as to the weight or sufficiency of evidence. *The State v. Bell*, 633.

10. Temporary absence of prisoner during trial. The fact that one of the defendants in a criminal case was absent from the court room for a few minutes while the prosecuting attorney was making the closing argument for the State, will not vitiate the verdict. *Ib.*

11. Temporary absence of juror. The absence of a juror from the box for a few minutes during a temporary suspension of proceedings in a criminal case, will not vitiate the verdict. *Ib.*

PRESUMPTION.

MURDER: PRESUMPTION OF MALICE. If a homicide is shown to have been committed willfully, premeditatedly and deliberately, with means and instruments likely to produce death, the malice requisite to make the offense murder will be presumed. *The State v. Curtis*, 594.

OF DEED. See Kimmel v. Benna, 52.

PRIEST.

GIFT BY ONE IN EXTREMIS TO. See Ford v. Hennessy, 580.

PRINCIPAL AND AGENT.

1. AGENT'S KNOWLEDGE. The rule that the knowledge of the agent affects the principal, is applicable not only to knowledge acquired during the continuance of the agency, but to such as was acquired so shortly before it began as necessarily to give rise to the inference that it remained fixed in the mind of the agent during his employment. *Chouteau v. Allen*, 290.

2. ASSIGNMENT OF JUDGMENT. An assignment of a judgment made on the margin of the record by an agent, in his own name, but by authority of the principal, is good to pass the equitable title at least. *Emory v. Joice*, 537.

3. BROKER, WHEN ENTITLED TO COMPENSATION. A broker employed to effect a sale is entitledto compensation if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the parties principal in person. *Timberman v. Craddock*, 638.

4. CORPORATION. To defeat an action brought against a corporation for the value of certain staves, the corporation offered to show that they were made of timber wrongfully taken from land which was the private property of its president, and that an agent of the corporation took possession of them for the president, but the evidence was excluded. *Held*, no error, there being no evidence that the agent of the corporation was also the agent of the president in his individual capacity. *Dunn v. The St. Louis, Iron Mountain & Southern Railway Company*, 663.

5. POWER OF FREIGHT AGENT TO CONTRACT. The general freight agent of a railroad company has power to bind the company by a contract for transportation to points beyond its own line; but a station agent has no such power, and such a contract entered into by him is void, unless the authority has been expressly conferred by the proper superior officer, or there have been previous dealings from which the authority may be reasonably inferred, or the company has held itself out as a common carrier to such points. *Grover & Baker Sewing Machine Company v. Missouri Pacific Railway Company*, 672.

PRINCIPAL AND SURETY.

1. A bond running in the names of several persons, one as principal and the others as sureties, but subscribed only by the sureties, is not obligatory on them. *Bunn v. Jetmore*, 228.

2. RECOGNIZANCE. The fact that the principal in a recognizance was arrested, tried, convicted, sentenced and imprisoned in another State, and was thereby prevented from fulfilling the conditions of the recognizance, will not avail the surety as a defense to a *scire facias*. *The State v. Horn*, 466.

3. COUNTY SCHOOL FUNDS. The sureties in a bond given to the county to secure the payment of public school funds, will not be exonerated from liability on the bond by failure of the county officers to enforce the obligation against the principal when required by the sureties. *Johnson County v. Gilkeson*, 645.

PROMISSORY NOTE.

1. WAIVER OF NOTICE of dishonor of a promissory note cannot be shown by parol evidence. *Beeler v. Frost*, 185.

2. FRAUD: EVIDENCE OF NOTICE. The indorsee of a promissory note before taking it, was informed by the maker that it would be good "if the consideration for which it was given has not been misrepresented; this is not tested yet." *Held*, that he thereby became chargeable with notice that the validity of the note was a question which remained to be tested, and if it was procured by fraud or misrepresentation, he could not enforce it. *Studebaker Manufacturing Company v. Dickson*, 272.

3. BONDS, WHEN NON-NEGOTIABLE. A bond which, by its terms, is payable at a time certain, but contains a clause reserving to the makers "the right to pay the same at any time to be named by them, by adding to the principal a sum equal to twenty per cent. thereof," is non-negotiable for uncertainty as to the time of payment. *Chouteau v. Allen*, 290.

4. ———. Bonds with past due coupons attached are to be treated as dishonored paper. *Ib.*

5. CONSIDERATION. A delinquent administrator gave his own note in settlement of a demand against the estate of his intestate, upon an understanding that a suit then pending against him should be dismissed. The plaintiff afterwards refused to dismiss until the administrator should pay another demand which had been allowed against the estate. This was paid, and the suit was then dismissed. *Held*, that the exaction of this payment before carrying out the agreement to dismiss constituted no defense to an action on the note. *Smith v. Paris*, 615.

6. TRIALS: INSTRUCTIONS: PROMISSORY NOTES: INDORSER. Instructions should be predicated upon all the material evidence in the case.

In a suit against an accommodation indorser of a promissory note, the defense set up was that the indorsement was obtained by means of a representation and promise to the indorser, by the

plaintiff, that he was in possession of certain securities belonging to the maker of the note, with which to secure the note, and that, in case of the maker's failure to pay the same, the securities should be turned over to the indorser for his indemnification; and that defendant had tendered to plaintiff the amount of the note, and demanded the securities, which had been refused. There was evidence that one of the securities had come to the possession of defendant as a member of a partnership, to secure a loan by the firm to the maker of the note, and that the other securities had come to his possession, as one of the assignees, under an assignment by the maker for the benefit of his creditors. *Held*, that as such possession of the securities would confer no right on the defendant to use them for his individual benefit in the payment of the note, instructions which directed the attention of the jury to the naked question, whether or not the securities had been received by the defendant, ignoring the capacity in which and the object for which he had received the same, were calculated to mislead, and were erroneous. *Sheedy v. Streeter*, 679.

7. ———: EVIDENCE: INDORSER. Where it was part of the defense of an indorser of a note, that he was induced to make the indorsement by plaintiff's promise to deliver certain securities for his indemnification, his testimony that he had never before indorsed the paper of the maker, and would not then have done so unless he had felt amply secured by the collaterals, was held to be competent as tending to prove the defense. *Ib.*

ERASURE. See Mechanics Bank v. Valley Packing Company, 643.

See Stoutimore v. Clark, 471.

RAILROAD.

1. DAMAGE TO CATTLE: ACTION UNDER 43RD SECTION. In an action against a railroad company, for injury to cattle, brought before a justice of the peace under section 43 of the railroad law, (Wag. Stat., 310,) the statement must show that the injury was occasioned by the failure of the company to erect and maintain good and substantial fences along the sides of its road. *Cunningham v. The Hannibal & St. Joseph Railroad Company*, 202.

2. CONDITION SUBSEQUENT: RAILROAD RIGHT OF WAY: CITY ORDINANCE. A city ordinance granting to a railroad company a right of way over a street provided that the grant should become null and void if the company should ever remove its machine shops from the city. *Held*, that this was a condition subsequent, in which no one had any legal interest but the company and the city, and if the company violated the condition by removing the shops, this did not *ipso facto* terminate the right of way so as to entitle the owner of a lot abutting upon the street to maintain an action of damages against the railroad company as for an unlawful occupation of the street. *Knight v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 231.

3. NEGLIGENCE OF RAILROAD COMPANY: ESCAPE OF SPARKS: SUFFICIENCY OF EVIDENCE. In an action against a railroad company to recover damages for injury to plaintiff's farm by fire, alleged to have been communicated through the negligence of the company's

servants, by sparks emitted from a locomotive, the evidence as to the origin of the fire showed only that just after a train of cars on defendant's road had passed through plaintiff's farm, smoke was seen coming down the railroad, and immediately the fire which did the damage broke out in plaintiff's field within one hundred feet of the railroad track. *Held*, that this was sufficient to warrant the submission of the case to the jury without direct evidence that any sparks escaped from the locomotive. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 243.

4. ——: ——: PRIMA FACIE CASE: EVIDENCE IN REBUTTAL. Since the decision in *Fitch v. Pacific R. R. Co.*, 45 Mo. 322, it has been uniformly held that a *prima facie* case is made out against a railroad company when it is proved that the fire which did the damage was communicated by sparks from a locomotive attached to a passing train, and that it then devolves upon the company to show that the escape of sparks was not the result of negligence on its part. To this end it may show that the engine and machinery were of the most improved pattern and make, and were managed by careful and competent servants in a skillful and careful manner. Evidence that the company's servants were careful and competent men will not of itself be sufficient to rebut the presumption of negligence on their part, but may be submitted to the jury, in connection with other facts, to enable them to determine whether, on the particular occasion in question, they were managing the engine carefully and skillfully. *Ib.*

5. ——: ——: EVIDENCE. Upon the trial of an action against a railroad company to recover damages for injuries to plaintiff's farm occasioned by fire alleged to have escaped from one of the company's locomotives, the plaintiff exhibited to the jury an old worn and torn spark arrester as one of the defendant's. The evidence showed that it was found on defendant's road a month before the fire complained of took place, and could not have been in use at the time of the fire. *Held*, that its admission could have served no purpose but to inflame and prejudice the minds of the jury, and was, therefore, error. *Ib.*

6. NEGLIGENCE OF RAILROAD COMPANY: ESCAPE OF SPARKS. If sparks escaping from a railroad locomotive kindle a fire upon the company's right of way, and the fire extends to and destroys adjoining property, the loss is *prima facie* the result of the company's negligence. The liability incurred will not be avoided by showing that the spread of the fire was caused by the wind, or that there was no considerable accumulation of combustible material on the right of way. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 252.

7. ESCAPE OF SPARKS: FAILURE OF COMPANY'S SERVANTS TO EXTINGUISH FIRE. The employees of a railroad company do not, by reason merely of their employment, owe any duty to the proprietors of lands adjoining the company's right of way to extinguish a fire found on the right of way. If they omit to do so, and the fire extends to adjoining property and does injury, the company is not liable unless the fire originated through its negligence. *Ib.*

8. RAILROAD CONSTRUCTION CONTRACT: BRIBERY OF DIRECTOR. A construction contract is not void under sections 58 and 59 of the

railroad law, (R. S. 1855, p. 438,) because the contractor has an agreement with a director of the railroad company to divide the profits of the contract with him. SHERWOOD, C. J., and NORTON, J., dissenting. *Chouteau v. Allen*, 290.

9. LIABILITY FOR DAMAGES BY CONSTRUCTION OF ROADWAY. A railroad company, in constructing its road across a basin-shaped piece of low land, raised an embankment with a culvert or water-way, through which water, collected on one side of the road from the adjacent high lands and from the overflow of a neighboring creek, escaped to the other side and damaged the adjoining premises. *Held*, that the company was liable; and so far as the overflowed water from the creek contributed to the injury, the liability was the same, whether the overflow was caused by the act of the company in building a bridge over the creek too narrow for the volume of water or not. *McCormick v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 359.

10. CONSTITUTIONAL LAW. The double damage section of the railroad law does not conflict with the constitution of 1865. *Cummings v. The St. Louis, Iron Mountain & Southern Railway Company*, 570.

11. JUSTICE'S COURT: STATEMENT: JURISDICTION: RAILROAD: DAMAGE TO CATTLE. The plaintiff's statement of his cause of action filed with the justice of the peace in the present case, (an action upon the statute to recover double damages for the killing of a heifer;) *Held*, to comply with the rule which requires the statement in this class of cases to show that the killing occurred in the township in which the justice resides and has jurisdiction. *Ib.*

12. NEGLIGENCE. Persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance in carrying passengers to their destinations, and setting them down safely; and the company is responsible for want of care and foresight on their part in doing it, but not for any damages to which passengers may expose themselves by their own recklessness or carelessness. If a passenger be negligently carried beyond his stopping place, he can recover for the inconvenience, loss of time and expense of traveling back, but if he jumps or leaves the train under circumstances which prudence would forbid, he does it at his own risk and assumes the consequences of his own act. *Kelly v. The Hannibal & St. Joseph Railroad Company*, 604.

13. EMINENT DOMAIN: RAILROAD: DAMAGES: BENEFITS. In estimating the damages growing out of the condemnation of a right of way for a railroad, the jury should consider the quantity and value of the land taken, and the damage to the tract of which it forms part by reason of the road running through it, and from the sum of these should deduct the benefits, if any, peculiar to that tract, arising from the running of the road through it; and by peculiar benefits is meant such benefits derived from the location of the road as are not common to it and the other land in the same neighborhood. *The Wyandotte, Kansas City & Northwestern Railway Company v. Waldo*, 629.

14. EMINENT DOMAIN: RAILROAD: DAMAGES TO ENTIRE TRACT. Where a tract of land consists of several parcels all connected and constituting one body, the jury, in estimating the damages sustained by the owner by reason of the condemnation of a right of way for

a railroad across the tract, should consider the injury to the whole and not simply the injury to the parcels touched by the road. *Ib.*

15. KILLING CATTLE AT PUBLIC CROSSING. To maintain an action against a railroad company for the killing of cattle at the crossing of a public highway, founded on section 38 of the railroad law, (Wag. Stat., p. 310; R. S., § 806,) it is not sufficient to show that the whistle was not sounded as required by that section. It must appear that neither was the whistle sounded nor the bell rung. *Van Note v. Hannibal & St. Joseph Railroad Company*, 641.

16. CONTRACT TO CARRY BEYOND TERMINUS. A railroad company may be bound by contract, express or implied, but not otherwise, to transport persons or property beyond the line of its own road. *Grover & Baker Sewing Machine Company v. Missouri Pacific Railway Company*, 672.

17. ———: POWER OF FREIGHT AGENT TO CONTRACT. The general freight agent of a railroad company has power to bind the company by a contract for transportation to points beyond its own line; but a station agent has no such power, and such a contract entered into by him is void, unless the authority has been expressly conferred by the proper superior officer, or there have been previous dealings from which the authority may be reasonably inferred, or the company has held itself out as a common carrier to such points. *Ib.*

CHILLICOTHE & BRUNSWICK RAILROAD CHARTER. See Dixon v. Livingston County, 239.

RECOGNIZANCE.

PRINCIPAL AND SURETY. The fact that the principal in a recognizance was arrested, tried, convicted, sentenced and imprisoned in another State, and was thereby prevented from fulfilling the conditions of the recognizance, will not avail the surety as a defense to a *scire facias*. *The State v. Horn*, 466.

REFEREE.

REFEREE'S REPORT: PRACTICE. The court is not bound to adopt or reject the report of a referee *in toto*; but may adopt it with modifications. *Smith v. Paris*, 615.

REMITTITUR.

See Whetstone v. Shaw, 575.

REPLEVIN.

1. FORM OF JUDGMENT IN. While a party to a replevin suit cannot be compelled to elect whether he will take the property or its value before the property has been delivered to the sheriff under the judgment of the court, yet, when he does so elect, after a verdict in his favor, the court may properly render a simple money judgment. *Wooldridge v. Quinn*, 370.

2. ATTACHMENT: INTERPLEA: ESTOPPEL. One claiming title to personal property which had been taken in attachment as the property of another, obtained leave of court to interplead in the attachment proceedings. He failed, however, to file an interplea, and judgment went in favor of the plaintiff in the attachment. In replevin against the sheriff to recover the property; *Held*, that these facts did not preclude the plaintiff 's recovery. *Wangler v. Franklin*, 659.

3. JUDGMENT IN: DAMAGES. If the evidence in an action of replevin does not show that the plaintiff sustained damage by reason of the detention of the property, a judgment in his favor should be for possession alone, and not for possession and damages. *Ib.*

RES ADJUDICATA.

ADMINISTRATOR'S FINAL SETTLEMENT. See Woodworth v. Woodworth, 601.

JUDGMENT AGAINST EXECUTOR, EFFECT AS AGAINST HEIRS. See Ford v. Hennessy, 580.

RESISTING LEGAL PROCESS.

1. SUFFICIENCY OF INDICTMENT. An indictment for resisting service of a warrant of arrest, is not bad because it fails to charge in express terms that the officer had the warrant in his possession at the time the resistance was offered. *The State v. Estis*, 427.

2. PLEADING: EVIDENCE. An indictment for resisting arrest under a warrant, need not show to whom the warrant was delivered by the officer who issued it; nor need this be shown on the trial. It is immaterial through what agency it reaches the hands of the officer whose duty it is to serve it. *Ib.*

3. EVIDENCE. On the trial of an indictment for resisting arrest under legal process, evidence to show that threats of personal violence had been made against the prisoner, (but not by the officer who made the arrest,) is inadmissible. *Ib.*

ROAD.

1. PUBLIC ROADS: TITLE BY USER. Ten years adverse occupancy and use of a road by the public, acquiesced in by the owner, will vest in the public an easement in the road and cause it to become a highway. *The State v. Wells*, 635.

2. ———: DISCONTINUANCE BY COUNTY COURT. The county court can discontinue or vacate a public road only after a proper proceeding had in the manner pointed out by the statute. It cannot by its mere order or by instructions to the road overseer divest the rights of the public, whether they were acquired by dedication or by adverse possession. *Ib.*

3. OBSTRUCTION: SCIENTER. It is no defense to a prosecution for ob-

structing a public highway, that the defendant did not know that the highway was legally established. *Ib.*

ST. LOUIS.

1. ST LOUIS VEHICLE LICENSE ORDINANCE. Ordinance No. 10,494 of the city of St. Louis, imposing a license tax upon vehicles using the streets of the city, is valid. *The City of St. Louis v. Green*, 562.

2. ———: ENFORCEMENT OF, BY CRIMINAL PROSECUTION. The city of St. Louis has power, under its charter, to impose, and by criminal prosecution, enforce penalties for violation of an ordinance exacting a license from vehicles using the streets of the city. *Ib.*

SALE.

1. FRAUD: SALE OUT OF USUAL COURSE OF BUSINESS. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business, will not necessarily invalidate the sale. The question is one of fraud in fact, and is properly left to the jury. *The State ex rel. Peirce v. Merritt*, 275.

2. ———: CHANGE OF POSSESSION. As against creditors a sale of goods will be held fraudulent and void unless the vendee takes and retains actual, visible and exclusive possession, such possession as to indicate to purchasers at large that the vendor no longer has control. *Ib.*

3. ———: OPPORTUNITIES OF DISCOVERING. It is not the duty of the purchaser to inquire into the motives of the seller for making the sale. Hence, he is not chargeable with knowledge of a fraudulent purpose on the part of the seller merely because he failed to avail himself of an opportunity of making investigations which, if made, would have revealed the purpose. *Ib.*

4. ———: INSOLVENCY OF SELLER. Fraud in a sale cannot be inferred from the mere fact that the seller is insolvent. *Ib.*

5. CONDITIONAL SALE OF PERSONALTY A condition in a contract of sale of personal property that the title shall remain in the vendor until the purchase money is paid, is valid and will be enforced even against a *bona fide* purchaser, notwithstanding it is not acknowledged or proved and recorded as required of certain instruments by section 5, page 280, Wag. Stat. That section does not apply to such contracts. *Wangler v. Franklin*, 659.

SCHOOLS.

PRINCIPAL AND SURETY: COUNTY SCHOOL FUNDS. The sureties in a bond given to the county to secure the payment of public school funds, will not be exonerated from liability on the bond by failure of the county officers to enforce the obligation against the principal when required by the sureties. *Johnson County* v. *Gilkeson*, 645.

SET-OFF.

1. In equity: judgment: insolvency: parties. Where two parties, one of whom is insolvent, hold a judgment against a third, and he has a judgment against the insolvent, a court of equity, to prevent injustice, will ascertain the interest of the insolvent plaintiff in the former judgment, and will set-off against his interest the judgment against him. To a proceeding instituted for this purpose the co-plaintiff of the insolvent is a necessary party. *Fulkerson v. Davenport*, 541.

2. Partnership. A debt due a partnership cannot be set-off against a debt due by an individual partner. *Weil v. Jones*, 560.

SHERIFF.

1. Execution sale: death of sheriff before executing a deed: appointment of substitute. Under section 62 of the chapter on executions, which provides that on the death or removal of a sheriff after he has made a sale and before he has executed a conveyance, the court may appoint the sheriff then in office to execute and acknowledge a deed to the purchaser, the latter has only the same powers as the officer who made the sale would have had, if his death or removal had not intervened. *In re Guenzler*, 39.

2. ———: in case of conveyance by purchaser before execution of deed. The court will not in a proceeding under this statute compel a sheriff to execute a deed to the grantees of a purchaser who has died. But it may in such case permit the sheriff to execute the deed to his legal representatives without naming them. *Ib.*

Indemnifying bond. See Flint *ex rel.* Lumpkin v. Young, 221.

SIGNIFICATION OF TERMS.

"Unoccupied." See Cook v. The Continental Insurance Company, 610.

SPECIFIC PERFORMANCE.

Of agreement to arbitrate. See City of St. Louis v. St. Louis Gaslight Company, 69.

STATUTE.

1. Misrecital of statutory authority. Where two statutes authorized the county courts of certain counties to make certain subscriptions and to cause certain patents to be issued, one upon condition and the other without condition, and orders of subscription were made and patents were issued reciting the former act as the authority for making them, but it did not appear that the condition had been complied with; *Held*, that the orders and patents were, nevertheless, as valid as if they had recited the latter act. *Chouteau v. Allen*, 290.

2. Interpretation of statutes. When the provisions of a law are

inconsistent and contradictory to each other, or a literal construction of a single section would conflict with every other and with the entire scope and manifest intent of the act, it is the duty of the court, if it be possible, to harmonize the various provisions, and to effect this it may be necessary to depart from a literal construction of one or more sections. *The State to the use of Rosenblatt v. Heman*, 441.

3. INDICTMENT IN STATUTORY LANGUAGE. When a statute defining an offense employs terms which have a fixed legal signification, an indictment following the language of the statute, without more, will be good.

This rule is applicable to an indictment against a father under section 34, page 497, Wag. Stat., for "abandonment" of his child. *The State v. Davis*, 467.

4. THE repeal of a statute does not operate a revival of the common law. *The State v. Slaughter*, 484.

STATUTORY OBLIGATION TO ARBITRATE NOT ENFORCEABLE IN EQUITY. See City of St. Louis v. St. Louis Gaslight Company, 69.

EFFECT OF CHANGE OF HOMESTEAD ACT. See Register v. Hensley, 189.

BOND VALID THOUGH NOT IN STATUTORY FORM. See Flint *ex rel.* Lumpkin v. Young, 221.

JUDICIAL NOTICE OF. See The State v. Broderick, 622.

AMENDMENT OF. See The State v. Chambers, 625.

BANKRUPT LAW NOT ADMINISTERED BY STATE COURT. See The State *ex rel.* Peirce v. Merritt, 275.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879.

Section 806, see Railroad, 15.
Section 1232, see Criminal Law, 8.
Section 1239, see Criminal Law, 3.
Section 1538, see Incest.
Section 2400, see Sheriff, 1.
Section 3251, see Limitations, 3.
Section 5608, see Costs, 1.

WAGNER'S STATUTES OF 1872.

Page 88, § 35, see Will, 2.
Page 94, §§ 2, 3, 4, see Administration, 3.
Page 118, § 6, see Administration, 10.
Page 204, § 23, see County, 1.
Page 205, § 35, see County, 1.
Page 269, §§ 1, 2, 4, see Contract, 1.
Page 280, § 5, see Sale, 5.
Page 281, § 8, see Fraudulent Conveyance.
Page 292, § 16, see Corporation, 6.
Page 310, § 38, see Railroad, 15.
Page 315, § 43, see Railroad, 1, 10, 11.
Page 449, § 29, see Pleading, Criminal, 4.
Page 450, § 34, see Abortion.
Page 497, § 34, see Abandonment.
Page 514, § 15, see Embezzlement.
Page 516, § 29, see Justice's Courts, 4.
Page 541, § 16, see Will, 1.
Page 607, § 28, see Execution, 3.
Page 613, § 62, see Execution, 1, 2.
Page 660, § 1, see Gaming, 1.
Page 706, § 2, see Fence.
Page 817, § 2, see Justice's Court, 3.
Page 906, see Agistment.
Page 1089, § 22, see Pleading, Criminal, 6.
Page 1089, § 22, see Practice, Criminal, 1.
Page 1090, § 27, see Pleading, Criminal, 2.
Page 1103, § 13, see Jury, 2.

GENERAL STATUTES OF 1865.

Page 816, § 6, see Incest.

REVISED STATUTES OF 1855.

Page 438, §§ 58, 59, see Contract, 5.

ACTS OF 1877.

Page 281, see Constitutional Law, 5.

ACTS OF 1873.

Page 249, § 20, see Municipal Corporation, 4.

STATUTE OF FRAUDS.

See Gillespie v. Stone, 505.

SUICIDE.

1. INDICTMENT FOR MURDER: CONVICTION OF MANSLAUGHTER; ASSISTING SUICIDE. A prisoner indicted for murder is properly convicted of manslaughter in the first degree if the evidence shows that his offense consisted in assisting the deceased in committing suicide. R. S. 1879, § 1239. *The State v. Ludwig*, 412.

2. ASSISTING SUICIDE. Upon the trial of an indictment under the statute which declares every person "deliberately assisting" another in the commission of self murder, guilty of manslaughter in the first degree, it is no error to instruct that the defendant is guilty if he was "deliberately present, assisting" the deceased. *Ib.*

SUICIDE, SANE OR INSANE. See Adkins v. Columbia Life Insurance Company, 27.

SUMMONS.

A SHERIFF'S RETURN upon a writ of summons showing that he has executed the writ by leaving a copy of the writ and petition "at the usual place of abode, *when in the city of Cape Girardeau*, of the within named defendant, with a person of *the* family over the age of fifteen years," is bad, and a judgment by default rendered on such return is a nullity. *Brown v. Langlois*, 226.

TAX.

1. REVENUE LAW OF 1865: FORFEITED LANDS: STATE'S LIEN FOR TAXES. The 116th section of the revenue law of 1865, (Gen. Stat., p. 128,) did not vest in the State the absolute title to lands which, for want of bidders at a tax sale, were struck off to the State, but only gave a lien for the taxes. *The State to the use of Rosenblatt v. Heman*, 441.

2. BACK TAX ACT OF 1877, CONSTITUTIONAL. The act of 1877 to provide for the collection of delinquent taxes, imposes no new obligation and so is not obnoxious to the constitutional prohibition against retrospective laws. Acts 1877, p. 384. *Ib.*

3. ——: STATUTE OF LIMITATIONS. No action under the back tax act of 1877, for the collection of taxes more than five years delinquent, was barred by the statute of limitations, if it was brought within five years from March 31st, 1875, the date of the passage of the back tax act of that year. Sess. Acts 1875, p. 82. *Ib.*

VEHICLE LICENSE. See City of St. Louis v. Green, 562.

TENDER.

1. A vendor of land cannot recover the purchase price without first tendering a deed. *Pershing v. Canfield*, 140.

2. AGISTMENT: LIEN: ACTION UNDER THE STATUTE: TENDER. Tender of the full amount due for the keep of cattle extinguishes the lien given by the statute, (2 Wag. Stat., 906,) but does not take away the plaintiff's right to an ordinary money judgment for that amount without costs if he refuses the tender and sues to enforce a lien for a greater amount. *Berry v. Tilden*, 489.

TRESPASS.

FENCES: DAMAGE TO CROPS BY CATTLE. No action can be maintained for damage to crops by cattle trespassing, unless the field in which the crops are grown is inclosed with such a fence as is prescribed by section 2, Wag. Stat., page 706. *Mann v. Williamson*, 661.

TRUSTS.

1. STATUTE OF LIMITATIONS: STATUTE OF FRAUDS: TRUSTS. Neither the statute of frauds nor the statute of limitations can be interposed to prevent the enforcement of an agreement made by a purchaser at execution sale to permit the execution defendant to redeem. *Gillespie v. Stone*, 505.

2. ACTION TO ENFORCE AGREEMENT TO PERMIT REDEMPTION. In order to maintain such an action, the plaintiff must prove very clearly and satisfactorily; 1st, That such agreement was actually made before the sale; 2nd, That through the contrivance or with the consent of the defendant, it deterred others from bidding at the sale; 3rd, As explanatory of the foregoing, the actual market value of the property at the date of the sale. A great disparity between such value and the price paid has a very material bearing with a court of equity in reaching a conclusion where evidence on the main points is inconclusive; 4th, The date of the offer to redeem, which should be within a reasonable time, if none is limited by the agreement. *Ib.*

NO LIMITATION RUNS AGAINST. See Chouteau v. Allen, 290.

VARIANCE.

INDICTMENT: EVIDENCE: VARIANCE. An indictment contained what purported to be a *verbatim* copy of a warrant for the arrest of defendant for obtaining goods under false pretenses. The warrant offered in evidence charged the defendant with obtaining goods "*unde fales pretens.*" *Held*, that the variance was immaterial both at common law and under section 22, page 1089, Wag. Stat. *The State v. Estis*, 427.

IN NAME OF ACCUSED. See The State v. Wammack, 410.

VENDOR AND VENDEE.

1. ACTION FOR PURCHASE MONEY: FAILURE OF TITLE: SURRENDER OF POSSESSION: ESTOPPEL. A vendee of land holding under a contract by the terms of which he is entitled to a warranty deed upon payment of the purchase money, and which recites delivery of posses-

sion by the vendor to the vendee, cannot, without surrendering possession, defeat the recovery of the purchase money by showing that the vendor had no title; nor will he be permitted to show that when he made the contract with the plaintiff he was already in possession by virtue of a purchase from the true owner. The recital in his contract estops him. *Pershing v. Canfield*, 140.

2. ——: TENDER. A vendor of land cannot recover the purchase price without first tendering a deed. *Ib.*

REFORMATION OF DEED. See McFadden v. Rogers, 421.

REFORMATION OF MARRIED WOMAN'S DEED. See Pearl v. Hervey, 160.

VENDOR'S LIEN.

NONE CAN EXIST AFTER PAYMENT OF PURCHASE MONEY. See Pearl v. Hervey, 160.

CANNOT BE ENFORCED BY PROBATE COURT. See Ross v. Julian, 209.

VERDICT.

1. THE verdict of a jury will be regarded as conclusive upon the facts by this court, when no evidence is preserved in the record. *Kimmel v. Benna*, 52.

2. THE Supreme Court will not disturb the finding of a jury on a question of fact. *Wright v. McPike*, 175.

3. THE verdict in this case, *Held*, not liable to the objection of vagueness or uncertainty. *Davenport v. Fulkerson*, 417.

WAIVER.

OF DEFECT OF PARTIES. See Donnan v. The Intelligencer Printing & Publishing Company, 168.

OF NOTICE OF APPEAL. See Wolff v. The Danforth Artificial Light Company, 182.

OF NOTICE OF SALE OF PLEDGED PROPERTY. See Chouteau v. Allen, 290.

WILL.

1. HOMESTEAD: EFFECT OF CHANGE OF STATUTE: WIDOW'S RENUNCIATION OF HUSBAND'S WILL. The widow's right of homestead in her husband's lands becomes fixed upon his death, and is not affected by a subsequent change in the statute, occurring before she applies to have the homestead set apart. Nor does it matter that he left a will, by the terms of which, she took a different estate in the lands from what she would be entitled to under the homestead act, and she made no renunciation of its provisions until after the change in the statute, provided she did make a renunciation within twelve

months after his death, as allowed by section 16 of the dower act, Wag. Stat., p. 541. *Register v. Hensley*, 189.

2. WIDOW'S ALLOWANCE: RENUNCIATION OF WILL. When a widow is entitled under her husband's will to precisely the same amount of personal property that she would take under the administration law, (Wag. Stat., § 35, p. 88,) and she actually receives it, the fact that upon subsequently renouncing the provisions of the will, she does not surrender the property to the administrator, will not invalidate the renunciation. As soon as the renunciation is made, her right to the property becomes absolute under the law. *Ib.*

AS ACKNOWLEDGMENT OF DEBT TO DEFEAT STATUTE OF LIMITATIONS. See Allen v. Collier, 138.

WITNESS.

1. REFRESHING WITNESS' MEMORY. When the truth of a certificate of acknowledgment given by a notary on a printed form is the matter in dispute, and the notary is called as a witness, it is not proper to exhibit the certificate to him by way of refreshing his memory. It can be of no service for that purpose. *Steffen v. Bauer*, 399.

2. ACTION FOR WIFE'S LAND: HUSBAND A COMPETENT WITNESS. In an action brought by husband and wife to set aside a deed of trust on the wife's land, the husband is not disqualified as a witness. His marital right in the property gives him such an interest as entitles him to testify on his own behalf. It is not material that his testimony will necessarily affect his wife's interest also. *Ib.*

3. WITNESS: PRACTICE, CRIMINAL. It has never been determined by this court that the State is bound to call as witnesses upon a trial for murder, all persons who were present at the homicide; but if such be the law, it imposes no duty to call a person whose presence is denied by the State. *The State v. Kilgore*, 546.

4. DECEASED WITNESS: EVIDENCE is admissible to show what testimony was given on a former trial by a witness since deceased, provided the adverse party had an opportunity to cross-examine him. *Breeden's Administrator v. Feurt*, 624.

GRAND JUROR CANNOT TESTIFY, WHEN. See The State v. Wammack, 410